TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 322

NORTH CAROLINA RAILROAD COMPANY, PETITIONER,

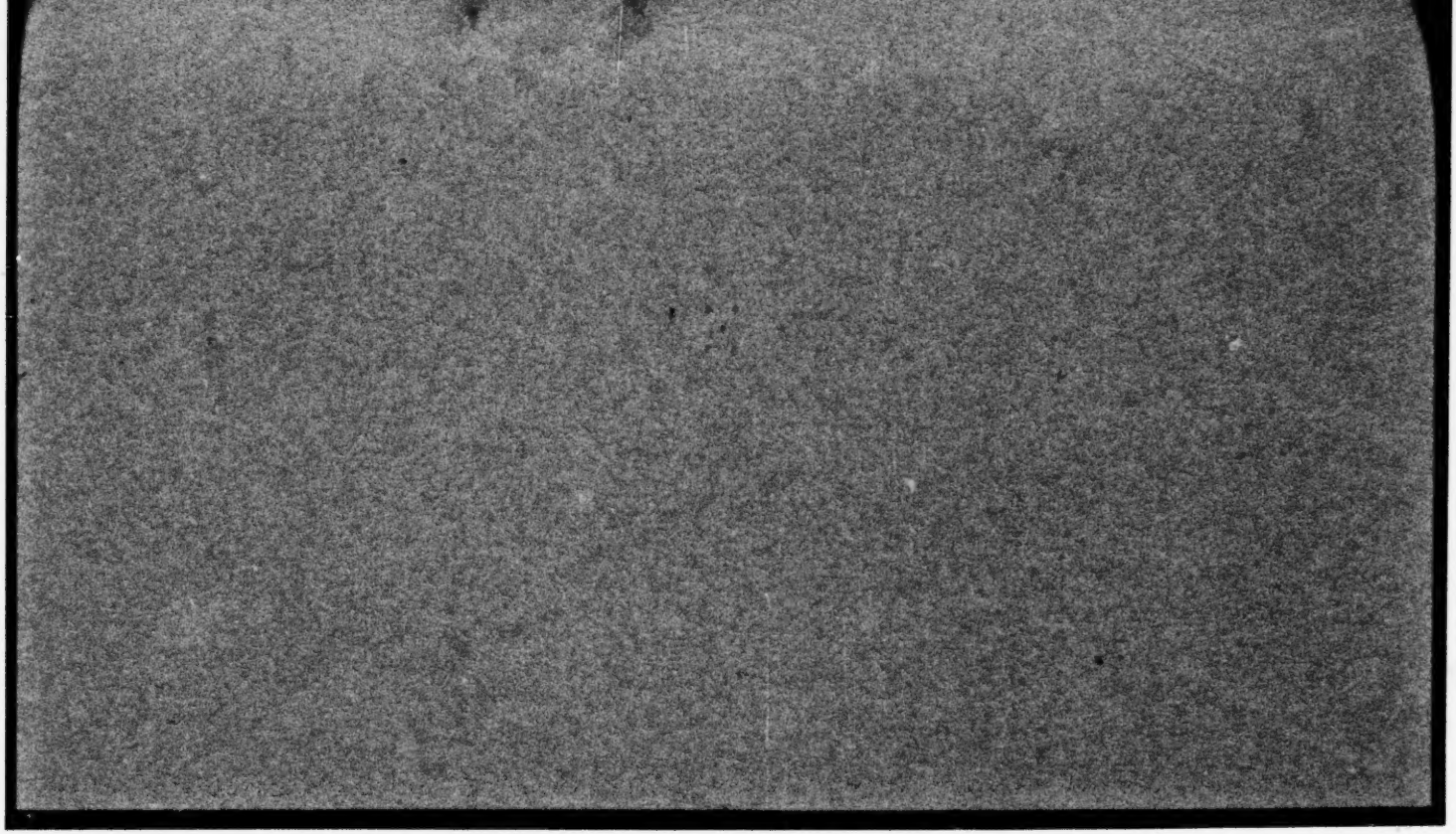
vs.

C. D. STORY, SHERIFF OF ALAMANCE COUNTY, NORTH CAROLINA, AND P. M. KING, ADMINISTRATOR, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED MARCH 12, 1935

CERTIORARI GRANTED APRIL 1, 1935



(30,189)

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[fol. 1] **IN SUPERIOR COURT OF GUILFORD COUNTY, TWELFTH DISTRICT**

No. 386

North Carolina Railroad Company

v.

C. D. Story, Sheriff of Alamance County, North Carolina, and P. M. King, Administrator of Maggie Barber, Deceased

(From Guilford)

Before Shaw, J. Plaintiff Appealed

Notation re Summons

(Summons to Sheriff of Guilford County, upon P. M. King, Administrator of Maggie Barber, deceased, dated May 5, 1923, and showing service May 8, 1923, appears in original transcript).

(Summons to Coroner of Alamance County, upon C. D. Story, Sheriff of Alamance County, dated May 5, 1923, appears in original transcript, and shows service.)

In Superior Court of Guilford County

Bill in Equity

To the Honorable W. F. Harding, judge holding the Superior Court for the County of Guilford, N. C.:

This bill of the North Carolina Railroad Company respectfully shows:

1. That plaintiff, the North Carolina Railroad Company, is a railroad corporation, duly created under the laws of the state of North Carolina, organized and existing and owning property in this State and in the County of Alamance. The defendant, C. D. Story, is a resident of this State and County of Alamance, and has been duly elected and has qualified and is acting as Sheriff of the County of Alamance, State of North Carolina. That the defendant, P. M. King, is a resident of this State and Guilford County, and was, on the 25th day of February, 1920, duly appointed administrator of Maggie Barber, deceased, and qualified and took upon himself the duties of said administrator.

2. That on March 9, 1920, the defendant, P. M. King, instituted a suit against the plaintiff, the North Carolina Railroad Company, to [fol. 2] recover damages on account of fatal injury to defendant, P. M. King's intestate, Maggie Barber, which occurred in the city

of Greensboro, North Carolina, on February 23, 1920, alleging that plaintiff was the owner of a certain track of railroad which was leased to the Southern Railway Company, for the purpose of transporting passengers and freight thereon, and that "* * * At all the times herein mentioned said lessee was in possession of said railroad under said lease, operating the same under the Director General of Railroads of the United States, pursuant to the Act of Congress in such case made and provided."

That said intestate while riding as a passenger in a motor truck, on a certain street in the city of Greensboro, which street intersected with the track of the North Carolina Railroad Company, was struck by an engine of the plaintiff's lessee, Southern Railway Company, and injured to such an extent that she died a short time thereafter. That said action was brought about by certain alleged acts of negligence on the part of plaintiff's lessee, which are fully set out in the declaration. To this suit, the plaintiff answered, admitting the lease of its line of road to the Southern Railway Company, but alleging:

"It is untrue as alleged that at the times mentioned said lessee was in possession of said railroad under said lease, or that it was operating the same under the Director General of Railroads, the facts being that said railway, with all of its equipment and property, had been taken over by the Government of the United States, under and by virtue of the Acts of Congress, and that the same was being operated by and through the Director General of Railroads, by virtue of said Acts of Congress and the orders of the President of the United States, and that the agents and employees operating said railroad were those of the Director General of Railroads."

The plaintiff further asks in its answer that the action be dis-[fol. 3] missed. At the trial of the cause, on March 21, 1921, judgment was rendered in favor of defendant, King, and against the plaintiff, in the sum of $2,500.00, with interest thereon from that date until paid, and for $93.65 costs. Said judgment is duly docketed in the Superior Court of Guilford County, North Carolina, on Judgment Docket No. —, page —, and by this reference asked to be considered as a part of this Bill. An appeal was taken from this judgment, but on account of the sickness of counsel representing the defendant, the limit of time within which a case on appeal should have been served expired without service of same, and counsel for the plaintiff declined thereafter to accept service of the case prepared and presented to him. No effort of any kind was made by the defendant, King, to enforce payment of this judgment by execution.

3. Subsequently, on February 8, 1922, defendant, King, instituted a second suit against plaintiff, in the same court, the Superior Court for Guilford County, North Carolina, in which defendant, King, recovered the judgment above referred to, which said second suit was in the following language:

"That on the 21st day of March, 1921, in the Superior Court of Guilford County, North Carolina, a judgment was duly given and

made by said Court in favor of the plaintiff and against the defendant herein, in an action in said Court pending, and wherein this plaintiff was plaintiff and said defendant was defendant, for the sum of $2,500.00, with interest thereon from March 21, 1921, at 6% per annum till paid, and for $93.65 costs of action.

"That asid judgment remains wholly unpaid.

"Wherefore, plaintiff demands judgment against defendant for $2,500.00 with interest thereon from the 21st day of March, 1921, at 6% per annum until paid, for $93.65 costs of former action, and for the costs of this action, to be taxed."

To this second suit, plaintiff answered admitting the entry of judgment referred to, but denying "* * * that the same was [fol. 4] legal or binding upon the defendant, as the same was obtained for the wrongful death of the plaintiff's intestate, caused by the negligence of the employees and agents of the Government of the United States while the properties of the defendant were being operated and controlled by the Director General of Railroads, under and by virtue of the Acts of Congress and the orders of the President of the United States, and that said judgment by reason thereof is illegal and void."

"The said judgment remains wholly unpaid.

"That on January 1, 1918, all lines of the Southern Railway Company, owned, controlled or operated by it, a part of which were the lines of the defendant, the North Carolina Railroad Company (the Southern Railway Company being the lessee thereof), together with its locomotives, engines, cars and all other equipment, were taken over by the United States of America, and since that date, and up to and including the date of the alleged injury and death of plaintiff's intestate (for which the judgment mentioned in the complaint was obtained), all of said lines, yards, switch tracks, engines and other equipment were continuously in the possession of and operated and controlled by the Director General of Railroads of the United States, such possession and control by such Director General being pursuant to certain Acts of Congress and proclamations of the President of the United States made pursuant to the authoriy duly vested in him; and at the time alleged in the original complaint (when the injury and death occurred), none of the persons in charge of or on the train, engine or cars referred to were in the employ of its defendant or of its lessee, the Southern Railway Company, nor did any of the agents or employees of this defendant or its lessee have any authority or control over the engine, train or cars referred to, or over the premises where said injuries were received. And this defendant says that to hold it liable for the death and the injury of the plaintiff's intestate and for the payment of the judgment mentioned in the complaint, would be to take its property without due process [fol. 5] of law, in violation of the Constitution of North Carolina and of the United States, and also in violation of the orders of the President of the United States and of the Acts of Congress, particularly of the Act known as the Transportation Act of 1920.

"Wherefore, the defendant, having fully answered, prays that the action may be dismissed, and that it go without day and recover of the plaintiff the costs of the action, to be taxed by the Clerk."

To this answer, the defendant, King, demurred, on the ground:

"* * * That the matters and things alleged in said answer were set up, or might have been set up in defense in the original action, and the judgment sued on is res adjudicata as to all such matters. Also plaintiff moves for judgment upon the pleadings."

By leave of the Court, plaintiff further answered, by means of an amended answer, as follows:

"1. That the judgment of the Superior Court of Guilford County, rendered March 21, 1921, for $2,500.00, with interest from that date at six per cent, plus $93.65 costs, which is the basis of the complaint in this action, was a judgment rendered in this same court, namely, the Superior Court of Guilford County, North Carolina, between the same parties, namely, P. M. King, Administrator of Maggie Barber, plaintiff, and North Carolina Railroad Company, defendant, summons in said suit being dated March 8, 1920, and served March 9, 1920, on a cause of action arising out of fatal injury to Maggie Barber, at Greensboro, North Carolina, February 3, 1920; that this present action, therefore, is an action brought to recover judgment in this court upon a judgment already rendered in this Court, which said judgment was rendered less than one year ago and is, therefore, to all intents and purposes a live judgment and not one about to expire by limitation or about to become subject to any other condition that a judgment in the present action could cure. The defendant, therefore, asserts that the plaintiff has no standing in this court [fol. 6] under these circumstances. If the plaintiff is permitted to pursue this second suit to a finality, and if he should secure a judgment herein, he could institute a third and successive suits, and there would be no end to the matter. The defendant denies that the plaintiff has the right to proceed in this Court in the present action and to cause the defendant to incur costs in the defense when there is already a judgment outstanding in the same matter in this same court. If he is permitted to continue to sue in successive suits it will cause a multiplicity of suits in one cause of action, and will cause defendant unnecessary costs and inconvenience.

"2. The defendant further says, that the reasons of the plaintiff's proceeding by this second cause of action to ask for a judgment upon the judgment in the first cause of action described in Section 1 above, is unknown to it; but it is believed that the purpose of the plaintiff is to try to evade in some way, the provisions of Section 206 (g) of the Act of Congress known as the Transportation Act of 1920, that:

'No execution of process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the

judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control.'

The judgment sued upon in this case was a judgment recovered in a cause of action which arose out of the possession, use, control and operation of the railroad lines of the defendant by the President under Federal Control, and hence under the section above quoted no execution or process can be levied upon the property of the defendant. The judgment is therefore unenforceable. If, therefore, it be the purpose of the plaintiff in this case to endeavor to nullify and evade [fol. 7] the express provisions of the Act of Congress, the defendant asks that he be restrained from asking for or having issued any execution or other process to enforce the collection of the judgment sued upon. To permit the plaintiff to subject the property of the defendant to the satisfaction of the judgment in this case, which judgment was rendered in a cause of action which arose during the possession, use and control of the properties of the defendant by the Government of the United States under an Act of Congress and the proclamations of the President, would be to take its property without due process of law and would amount, in effect, to confiscation.

"3. The defendant also asserts that the remedy of this plaintiff, if any, arises under section 206 (a) of the Transportation Act of 1920, which reads as follows:

'Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the President of the Railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916), of such character as prior to Federal Control could have been brought against such carrier, may, after the termination of Federal Control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act.'

That this action at law is based on a cause of action which arose out of the possession, use and operation by the President of the railroad of the defendant and such action can only be brought against the agent designated by the President, provided it is brought within the time prescribed by the Act.

"Wherefore, the defendant having fully answered, prays that the action may be dismissed at the cost of the plaintiff and that the plaintiff be enjoined and restrained from prosecuting this action against [fol. 8] the defendant, and that he be further restrained from applying for any execution or other process to enforce the collection of the judgment sued upon."

At the April Term, 1922, of the Superior Court of Guilford County, North Carolina, the demurrer of the defendant, King, (plaintiff there) was sustained and judgment was entered in his favor against the plaintiff (defendant in that action) in the sum of $2,500.00, with

interest from March 21, 1921, and the sum of $93.65 costs with interest, together with the costs of the second action.

An appeal was taken to the Supreme Court of North Carolina, and that court, at its Fall Term, 1922, on the — day of December, 1922, affirmed the action of the lower court.

4. That on or about the — day of April, 1923, the defendant, P. M. King, Administrator as aforesaid, sued out a writ of execution from the Clerk of the Superior Court of Guilford County, North Carolina, on the last named judgment, and that the defendant, C. D. Story, Sheriff of Alamance County, as aforesaid, was by said execution ordered and directed by the Superior Court of Guilford County, aforesaid, to levy upon the goods and property of the North Carolina Railroad and sell same in satisfaction of said judgment. That the said North Carolina Railroad Company has property in Alamance County and State of North Carolina, subject to execution, but as plaintiff is advised, informed and believes, such property is by various Acts of Congress of the United States exempt from execution on the judgment on which it is sued as aforesaid, or either of the judgments recovered as hereinbefore mentioned.

That notwithstanding this fact, defendant, C. D. Story, Sheriff, as aforesaid, on the — day of April, 1923, has levied on certain property of plaintiff, to-wit, a building at Burlington, N. C., in said County of Alamance, which is now occupied by the Secretary and Treasurer of the North Carolina Railroad as an office building, and a rectangular tract of land upon which said building stands, all of [fol. 9] which is in Alamance County, and State of North Carolina, and is threatening to sell and is about to sell said property of plaintiff, the said North Carolina Railroad Company, and that, unless restrained therefrom, will undertake to sell said property, to the great and irreparable injury to the interference with the prosecution of plaintiff's business and that of its lessee, and its public duty as a common carrier. That to subject the property of the plaintiff to the satisfaction of a judgment on a cause of action arising out of the operation of plaintiff's property by the Director General of Railroads under and by virtue of the authority placed in him by the Acts of Congress of the United States and the orders of the President thereof, as hereinbefore set out, would amount to confiscation and would be taking from the petitioner his property without due process of law, and would be denying to him the equal protection of the laws as provided for in the Constitution of the United States and likewise provided for in the Constitution of the State of North Carolina."

5. That the judgment recovered in the name of defendant, P. M. King, and docketed in the Superior Court of Guilford County aforesaid were recovered on causes of action for negligent injury and death of Maggie Barber at the time that the railroad on which the injury is alleged to have occurred was under Federal Control, being at such time in the sole and exclusive possession, control and operation of the Director General of Railroads.

6. That on or about the 1st day of January, 1918, pursuant to power conferred on him by the Act of Congress of the United States

approved August 29, 1916, and entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes" the President of the United States took over and assumed exclusive possession and control of all the lines of railway and operating property and equipment of plaintiff, the North Carolina Railroad Company, and thereafter, by authority conferred on him by said Act and an Act of the Congress of the United [fol. 10] States approved March 21, 1918, as amended, entitled "An Act to provide for the operation of transportation systems while under Federal Control, for the just compensation of their owners and for other purposes" exercised the exclusive power of operation and control of said lines and property of plaintiff, which period of Federal Control did not terminate until March 1, 1920. That during said period of Federal Control the President of the United States, or his duly appointed and constituted representative, namely, the Director General of Railroads of the United States was solely responsible for any damages caused by negligence in the operation or control of the property of plaintiff, North Carolina Railroad Company, nor is plaintiff now legally responsible for damages to person or property accruing during said period, resulting from operation by said Director General.

7. That the Congress of the United States enacted and plaintiff pleads the Act approved February 28, 1920, entitled "An Act to provide for the termination of Federal Control of Railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees; to further amend an Act entitled 'An Act to regulate Commerce,' approved February 4th, 1887, as amended, and for other purposes," commonly called the "Transportation Act, 1920," and provided in section 206 (g) that:

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal Control."

Wherefore, plaintiff prays that an order issue, restraining and permanently enjoining defendants from taking any further steps to satisfy the execution of the judgment referred to in this bill against the North Carolina Railroad Company, and specifically enjoining [fol. 11] C. D. Story, Sheriff, from selling the property of said plaintiff, heretofore levied upon, and from taking any further steps of any kind or character looking to the collection of said judgment from your plaintiff.

North Carolina Railroad Co., by Archibald Johnson, Secretary. Wilson & Frazier, Attorneys.

(Verified.)

In Superior Court of Guilford County

Answer

The defendants, answering the complaint herein, says:

1. Answering paragraph 2 thereof, the nature of the first action in the Superior Court of Guilford County of P. M. King, Administrator, against the North Carolina Railroad Company, No. 6788, the pleadings, trial, judgment and subsequent proceedings therein, are such as appear in the record of the said cause which will be produced by the defendants upon the trial of this action and upon the hearing of the motion for a temporary injunction, and any allegations in said paragraph two of said complaint inconsistent therewith are denied.

The defendants further say with regard to the failure of the North Carolina Railroad Company, defendant in the said action, to perfect its appeal to the Supreme Court of North Carolina, that after the verdict and judgment against it for $2,500.00 and costs was rendered at the March Term, 1921, of Guilford Superior Court, which term ended April 2, 1921, the said defendant, North Carolina Railroad Company, gave notice of appeal; that it was allowed by law fifteen days in which to prepare and serve its statement of its case on appeal; that upon its request P. M. King, Administrator, the plaintiff in the said action and appellee, consented that this time might be extended for sixty days from the said April 2, 1921; that the said extended time expired without any statement of case on appeal being filed or served or any request by the North Carolina Railroad Company within said time for a further extension thereof and without any agreement being made for such further extension.

[fol. 12] After said time had expired the North Carolina Railroad Company requested plaintiff to grant a further extension of time, but plaintiff at that time refused to do so. Thereafter, on June 17th, 1921, on motion of the plaintiff before Finley, Judge of the Superior Court of Guilford County, he struck from the files the statement of the case on appeal filed by the North Carolina Railroad Company after the time limited and the time extended as aforesaid had expired. A copy of the said order is hereto attached, marked Exhibit A, and asked to be taken as part of this answer, and no appeal was ever taken from the said order or from the judgment as originally rendered.

2. Answering paragraph three, the defendants say, that the record of the said second action between the said parties, No. 8102, referred to in this paragraph of the complaint, will be produced at the hearing and its contents will then truly appear.

Any statements in this paragraph of the complaint inconsistent with the said record are denied. The opinion and judgment of the Supreme Court of North Carolina on the said appeal affirming the judgment of the court below was rendered and filed in the said suit on the 29th day of November, 1922, and is reported in Volume 184 of the Reports of the Supreme Court of North Carolina. No effort or action was made or taken by the plaintiff in this suit to have the said judgment of the Supreme Court of North Carolina in the suit

referred to reviewed or modified but the plaintiff in this action has acquiesced in the same until the order rendered by Stack, Judge, March 30, 1923, and marked Exhibit B, was made directing that execution of the said judgment proceed.

3. Answering paragraph four, the allegations contained therein are denied except that the plaintiff P. M. King, Administrator, the plaintiff in action No. 8101, has caused an execution to be issued on the judgment in the said action pursuant to an order of Judge A. M. Stack, made in the said cause at the March Term, 1923, of Guilford Superior Court, a copy of which said order is hereto attached [fol. 13] as Exhibit B, and asked to be taken as part of this answer. The defendant, P. M. King, admits that he has caused to be issued and delivered to C. D. Story, Sheriff of Alamance County, North Carolina, an execution pursuant to the said order; that the said Sheriff has levied said execution on certain real property of the plaintiff, the title and possession whereof are in the plaintiff; that the said property so levied upon is not used by the plaintiff or its lessees for transportation purposes; that the plaintiff is not now and has not for many years been engaged in the transportation business or been a carrier of freight and passengers for hire, having leased all its property, not including the property levied upon, to the Southern Railway Company, a foreign corporation.

4. The allegations of paragraphs five and six of the complaint are denied.

5. Answering paragraph seven of the said complaint, these defendants admit that Congress enacted the statute therein referred to but they deny its application to this controversy.

For a further defense, these defendants say, that all the matters and things alleged in the complaint as grounds for injunctive or other relief in the present action have been heretofore adjudicated between the plaintiff and the defendant, P. M. King, Administrator of Maggie Barber, deceased, both by the Superior Court of Guilford County and by the Supreme Court of North Carolina and are as between them res adjudicata, and cannot again be litigated by the same parties in the present action.

Wherefore, the defendants pray that the temporary injunction prayed for be denied and the said action be dismissed and that they go hence without day and recover their costs of action, from the plaintiff.

W. P. Bynum, R. C. Strudwick, Attorneys for Defendants.

(Verified.)

[fol. 14] EXHIBIT "A" TO ANSWER

NORTH CAROLINA,
Guilford County:

SUPERIOR COURT, JUNE TERM, 1921

P. M. KING, Admr.,
v.
NORTH CAROLINA RY. CO.

Order.

In this case, it appearing to the Court from the records that the same was tried at March Term, 1921, which ended April 2, 1921, and that defendant appealed from the judgment therein and was allowed sixty days to make and serve statement of case on appeal; that said statement was not served till June 7, 1921.

It is now, on motion of plaintiff, considered by the Court that said statement not having been served within the time limited, be and the same is hereby striken from the records of this case.

T. B. Finley, Judge.

June 17, 1921.

EXHIBIT "B" TO ANSWER

NORTH CAROLINA,
Guilford County:

SUPERIOR COURT, MARCH TERM, 1923

No. 8101

P. M. KING, Admr. of Maggie Barber,
vs.
NORTH CAROLINA RY. CO.

Order

In this action, it appearing to the Court that judgment was recovered by plaintiff against defendant at April Term, 1922, of this Court, in the sum of $2,595.65 with interest and costs, that defendant appealed from said judgment to the Supreme Court, and that on said appeal the said judgment was affirmed, and that the certificate of the determination of said appeal has been received, and is now on file.

It is now considered and adjudged by the Court that execution of said judgment do proceed.

A. M. Stack, Judge Presiding.

March 30, 1923.

[fol. 15] From the above judgment the defendant appeals to the Supreme Court, said defendant resisting and objecting to the signing of said judgment. Notice of appeal waived. Appeal bond fixed at $50.00.

A. M. Stack, Judge, etc.

In Superior Court of Guilford County

Restraining Order

Upon consideration of the verified Bill in Equity, duly filed herein, and the facts set forth therein, it is hereby ordered that the defendants, C. D. Story, Sheriff of Alamance County, North Carolina, and P. M. King, Administrator of Maggie Barber, deceased, show cause before Honorable T. J. Shaw, at Winston, on Tuesday the 22nd day of May 1923, why an injunction shall not be issued restraining them and each of them from taking any further steps to satisfy the execution of the judgment referred to in said Bill of Equity, against the North Carolina Railroad Company, rendered at the March Term, 1921, in favor of the defendant, P. M. King, as administrator of Maggie Barber, deceased, against the plaintiff, in the sum of $2,500.00; and especially why an injunction should not be granted enjoining C. D. Story, Sheriff of Almanace County, from selling the property of said plaintiff levied upon, and from taking any further steps of any kind or character looking to the collection of said judgment from the plaintiff; and it is further ordered that said defendants, their agents and servants, be, in the meantime, restrained, and are hereby forbidden to suffer or commit any of said acts with relation to the sale of said property or the collection of said judgment until the further order of this Court.

It is further ordered that as a condition precedent to the issuing of this restraining order, that the Clerk of the Superior Court of Guilford County, shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before and approved by said Clerk, in the amount of $500.00, to the effect that the plaintiff will pay to the parties enjoined, such damages not exceeding the amount [fol. 16] specified, as they shall sustain by reason of this order, if the Court finally decides that the plaintiff was not entitled thereto.

Dated this the 5th day of May 1923.

W. F. Harding, Judge Superior Court.

(Undertaking in amount $500.00, in accordance with above Restraining Order appears in original transcript.)

In Superior Court of Guilford County

Judgment

This cause coming on to be heard, and being heard before the undersigned at Winston-Salem, N. C., on Tuesday, the 22nd day of May, 1923, the said hearing being in accordance with an order

theretofore made in said cause by Honorable W. F. Harding, and the matter having been heard and taken under advisement;

It is now ordered and adjudged, that the motion of the plaintiff to continue and make permanent and temporary restraining order issued by Honorable W. F. Harding, be and it is hereby denied.

IN SUPERIOR COURT OF GUILFORD COUNTY

NOTATION AND ORDER RE APPEAL

In the exercise of the discretion vested in the Court by Chapter 58 of the Public Laws of North Carolina of 1921, and upon motion of the plaintiff, the order of Judge Harding heretofore entered in this case is continued in force and effect pending plaintiff's appeal from the refusal to make said order permanent and the action of the Supreme Court of North Carolina upon said appeal, upon condition that the plaintiff execute a good and sufficient bond in the sum of $3,500.00, conditioned as is provided by the aforesaid statute.

The plaintiff is taxed with the costs of the case.

This the 15th day of June, 1923.

Thos. J. Shaw, Judge, etc.

To so much of the foregoing order as denies the application of the plaintiff to continue the temporary restraining order and make the same permanent, the plaintiff excepts and appeals to the Supreme Court. Notice of appeal is waived and appeal bond is fixed at $100.00.

[fol. 17] By and with the consent of the parties, it is ordered that the case on appeal to the Supreme Court shall consist of the summons, pleadings, Judge Harding's order, the foregoing order, plaintiff's assignment of error and the appeal bond.

Thos. J. Shaw, Judge, etc.

August 15, 1923.

IN SUPERIOR COURT OF GUILFORD COUNTY

ASSIGNMENTS OF ERROR

The plaintiff assigns as error:

The refusal of the Court to continue the temporary restraining order, and make the same permanent.

(Transcript certified by Clerk Superior Court.)

[fol. 18] IN SUPREME COURT OF NORTH CAROLINA

DOCKET ENTRIES

Appeal docketed 31 August 1923; case argued 31 October 1923; case carried under advisari to Spring Term 1924; opinion 20 February 1924 by Hoke, J., as follows:

[fol. 19] In Supreme Court of North Carolina, Fall Term, 1923

#385

North Carolina Railroad Company

v.

C. D. Story, Sheriff of Alamance County, and P. M. King, Administrator of Maggie Barber, Deceased

Guilford

Civil Action Heard on Return to Preliminary Restraining Order Before His Honor Thos. J. Shaw, Judge, on May 22, 1923

Opinion

The action is for a permanent injunction restraining defendants from collecting or attempting to collect by execution and levy a certain judgment obtained by P. M. King, administrator of Maggie Barber, deceased, against the North Carolina Railroad Company, hereafter called plaintiff. On the facts presented the application for further continuance of the restraining order was denied. The Court below, however, in the exercise of a discretion vested in it by a recent statute, Chapter 58, Laws of 1921, adjudged that the preliminary order be continued pending the appeal to this Court. From so much of the judgment as refuses to continue the restraining order to the hearing, and also make the same permanent, plaintiff excepts and appeals &c.

Wilson & Frazier, Manly, Hendren & Womble for plaintiff.
W. P. Bynum, R. C. Strudwick for defendants.

Hoke, Judge:

As we understand there is no substantial difference between the parties as to the facts affecting their rights, and from these facts contained in the present record, and by proper reference in the case of King, Admr. v. R. R., reported in 184 N. C. p. 442, it appears that plaintiff is lessor of the Southern Railway Company, under a lease for 99 years, which is still existent, and, under the terms of said lease and our state decisions appliable, is liable for the torts and wrongs of the Southern Railway Company, its agents and employees, committed in the use and operation of plaintiff's road, and in the exercise of its franchise. Mabry v. R. R., 139 N. C. p. 388, [fol. 20] citing Aycock v. R. R., 89 N. C. p. 321, and Logan v. R. R., 116 N. C. p. 940, and other cases.

That in February, 1920, P. M. King, admr. of Maggie Barber, deceased, sued the plaintiff railroad, alleging that his intestate had been negligently run over and killed by the agents and employees

of the Southern Railroad "operating plaintiff's railroad under the Director General of the United States &c., pursuant to the Acts of Congress, &c."

The plaintiff answered denying liability and alleging that plaintiff's road at the time was under the control of the Director General of the United States under the Acts of Congress and executive orders appertaining to the subject and denied that the intestate was killed or injured by the negligence of its lessee or any of its agents or employees, &c.

On issues submitted the administrator recovered judgment for $2,500.00 for the negligent and wrongful killing of the intestate by the lessee, and plaintiff except and prayed an appeal, but failing to prosecute the same, the judgment for said amount stands unchanged and unquestioned by any writ of error or other process looking to a modification or review of the same.

That said judgment not being paid, the administrator instituted an action thereon, alleged the existence of the judgment, its nonpayment, &c., and thereupon plaintiff answered admitting the recovery of said judgment, but denied any and all liability thereon, setting forth its defense in effect as follows:

"To this complaint defendant answered admitting the recovery and existence of the judgment sued on, but alleged that same was not a valid or binding judgment because it was obtained for the wrongful death of intestate caused by the negligence of the employees and agents of the Government of the United States while the properties of defendant were being operated and controlled by the Director General of Railroads under and by virtue of the acts of Congress and the orders of the President of the United States, and for that reason said judgment is illegal and void. Defendant alleged further, in effect, that this alleged negligent killing took place when its road and all equipment &c., was in control and charge of [fol. 21] the Government under the acts of Congress and orders aforesaid, and at a time when none of the agents and employees &c., of defendant or its lessees were engaged in operating said road or in any way responsible for said death, and to hold it liable for such an injury under such circumstances would be to take defendant's property without due process of law, &c. And in supplemental answer, filed by leave of court, alleged further that the present action on the judgment in behalf of defendant was in the endeavor to evade in some way the provision contained in the act of Congress known as the Transportation Act of 1920, sec. 206 (g), in terms as follows:

"'No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control.'

"An- defendant pleads further provisions of said Transportation Act in bar of recovery on the judgment."

And the administrator having demurred, there was judgment sustaining the demurrer in terms as follows:

"This cause coming on to be heard upon plaintiff's demurrer to the answer of defendant, it is now considered and adjudged by the court that said demurrer be and the same is hereby sustained. It is further considered and adjudged by the court that the plaintiff have and recover of defendant $2,500.00, with interest thereon from 21 March, 1921, and the further sum of $95.65, with interest from same date, and the cost of this action to be taxed."

From this judgment plaintiff excepted and appealed to this Court, where the judgment sustaining the demurrer was affirmed. See case of King, admr. v. R. R., 184 N. C. p. 442. And the opinion having been certified down, there was further judgment as follows:

"In this action, it appearing to the Court that judgment was recovered by plaintiff against defendant at April Term, 1922, of this Court, in the sum of $2,595.65 with interest and costs, that defendant appealed from said judgment to the Supreme Court, and that on said appeal the said judgment was affirmed, and that the certificate of the determination of said appeal has been received, and is now on file.

[fol. 22] "It is now considered and adjudged by the Court that execution of said judgment do proceed."

And these judgments stand unquestion- by writ of error or other process looking to their review or modification, and under and by virtue of the same the execution has been issued and levy made which plaintiff now seeks to enjoin.

Upon these the facts chiefly pertinent, we must approve his Honor's ruling in denial of the injunction, and are of opinion that the plaintiff is concluded by the judgments against it as to the protection and immunity it now endeavors to invoke. In the original action against the plaintiff, the fact that the road had been taken over by the government under the acts of Congress and executive orders appertaining to the subject was directly presented and the question of liability was decided against plaintiff. This was under the position then prevailing here and in some of the other state courts under these acts of Congress and executive orders, by correct interpretation the companies, in this instance plaintiff's lessee, were in charge of, and operating the roads under the supervision and control of the Director General, and in proper instances both could be held liable. True, the position was later disapproved by the Supreme Court of the United States, the final authority on these questions, in Miss. Pacific R. R. v. Ault, 256 U. S. p. 554, and other cases, but this only serves to show that the judgment in question was erroneous, and binds the parties unless and until it is reversed or modified by appeal or other writ in the orderly review of the case. See the de-

cisions cited in the case of King, Admr. v. R. R., 184 N. C., p. 442, among others, Grignons, lessee v. Astor et al. 2nd Howard U. S. pp. 319 & 340.

In this last case the Court among other things said:

"The purchaser is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the Court which rendered it in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of law which gave them the power to hear and determine the case before them, the title of the purchaser [fol. 23] is as much protected as if the adjudication would stand the test of a writ of error, and so where an appeal is given but not taken in the time allowed by law."

And in the second action, wherein judgment was rendered on the suit in the first, the plaintiff set up in his defense both the statutes and executive orders by which the roads were taken over by the government, and also the Transportation Act of 1920, being Chapter 91, 41st U. S. Statutes at Large, and this attempted defense having been held insufficient and disallowed, judgment was rendered against plaintiff, and as heretofore stated, stands thus far unquestioned by appeal, writ of error, or otherwise.

The appellant does not contend that the defenses he is now attempting to make were not presented, discussed and determined against it in these former suits, and that judgments were therein entered establishing his liability, but it is insisted that the proceedings and judgments have not been such as to enable it to obtain a review of the Federal question presented for the reason that in the opinion in the last suit there are grounds advanced sufficient to uphold the judgment which do not involve the Federal question relied upon, and therefore no right of review having been afforded, a remedy is still open to him under and by virtue of the provisions of the Transportation Act 41 Statutes At Large Chapter 41, sec. 216 (g), forbidding the levy of an execution on the property of the carrier where the cause of action in which it was obtained grew out of the operation of the road &c. while in possession and control of the government. The general principle, as stated, is undoubted and has been expressed and approved as late as April, 1923, in the case of The People ex rel. Doyle v. Atwell, 261 U. S., p. 590, but in our opinion the position will not avail the appellant.

Recurring again to the facts presented in the first action by the administrator, plaintiff having plead the acts of Congress and executive orders taking over the roads by the government in bar of relief, the defenses were disallowed and verdict and judgment were had establishing liability notwithstanding these alleged defenses. This judgment it will be noted having been entered more than twelve months after the Transportation Act went into effect.

[fol. 24] In a second suit on this judgment, as heretofore stated, the statutes and executive orders taking over the roads by the government, and the Transportation Act by which they were restored to the owners were all set up by plaintiff in its defense, and for rea-

sons stated in the opinion of the State Court, 184 N. C. p. 442, these defenses were disallowed and final judgment entered establishing liability.

True, in the opinion, the Court, referring to the language of the Transportation Act more directly applicable, sec. 2069, said:

"It might suffice to say in answer to this position that plaintiff thus far has not undertaken to levy any process or execution against the property of defendant road, and his proceeding does not therefore come within the literal terms of the provision on which he here relies."

But the Court, putting aside this view, deals directly with the defenses presented, holding that they were not available to plaintiff, and that the former judgment in favor of the administrator established an enforcible liability.

From the force and effect of these two judgments, unchallenged and unquestioned by writ of error or other process looking to their modification, we are of opinion as stated that plaintiff is concluded on the question of liability and that its application for an injunction against final process has been properly refused. So far from appellee's endeavoring to evade the effect of the Federal regulations on this subject as suggested in appellant's brief, it would seem that appellant, having lost his right to review the judgments had against it, is endeavoring to obtain a rehearing of the case by means of a second suit, a course that is uniformly condemned under our decisions appliable. Hospital v. R. R., 157 N. C. p. 460, and cases cited.

Speaking to the two inhibitions appearing in the Federal legislation and executive orders protecting the roads while in the control of the government, the Court in King, admr., v. R. R., among other things said:

"The first inhibition, as stated, being to protect the roads from physical interference by third persons, creditors, or other, while in possession and control of the Government, and the second to protect the carriers in the possession and control of their own roads [fol. 25] from physical interference by reason of any actions or judgments provided for and allowed by the Government, but this legislation, in our view, was never intended to protect the carriers from judgments in independent suits by claimants where they have failed to plead or properly insist on the immunity from liability which had been provided for their protection. The Government has made provision by its legislation to protect the carriers from molestation by reason of any judgments it has authorized and provided for, but it has not undertaken, as guardian ad litem, to avoid or destroy the force and effect of independent judgments against which the carrier has neglected or failed to interpose his proper defenses."

We find no error in the judgment appealed from and the same is affirmed.

Affirmed.

[fol. 25] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court of Guilford County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. A. Hope, Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed. And it is considered and adjudged further, that the defendant and surety, J. N. Wilson, do pay the costs of the appeal in this Court incurred, to-wit, the sum of Sixteen 95/100 dollars ($16.95), and execution issue therefor.

[fol. 26] IN SUPREME COURT OF NORTH CAROLINA

CLERK'S CERTIFICATE

I, Edward C. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a true and correct copy of the proceedings in this Court in the case entitled North Carolina Railroad Company vs. C. D. Story, Sheriff of Alamance County, and P. M. King, admr. of Maggie Barber.

Witness my hand and seal of said Court at office in Raleigh this 27 February, 1924.

Edward C. Seawell, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of North Carolina.)

[fol. 1] In Supreme Court of Guilford County, Twelfth District

No. 390

P. M. King, Administrator of Maggie Barber,

v.

North Carolina Railroad Company

(From Guilford)

Before Finley, J. Defendant Appealed

Notation re Summons

(Summons dated March 8th, 1920, appears in the original transcript, bearing following endorsement: "Served March 9th, 1920, by reading to and leaving a copy of this summons with C. A. Pamplin, agent of defendant. D. B. Stafford, Sheriff of Guilford County, by J. S. Phipps, D. S.")

(Alias summons, dated March 10th, 1920, appears in the original transcript, bearing following endorsement, "Served March 11, 1920, by reading to and by leaving a copy with C. A. Pamplin, Agent, North Carolina R. R. Co. D. B. Stafford, by J. S. Phipps, D. S.")

Order granted to sue in forma pauperis.

In Superior Court of Guilford County

Complaint—Filed July 1, 1920

Plaintiff, complaining of the defendant, alleges:

1. That Maggie Barber died intestate in said Guilford County, being domiciled therein, on Feb. 3rd, 1920.

2. That plaintiff thereafter, to-wit, on Feb. 23rd, 1920, was duly appointed by the said Superior Court as the administrator of her estate, and thereupon he duly qualified as such and he is now and has been since that date, the duly qualified and acting administrator of said Maggie Barber.

3. That defendant is a corporation duly organized and existing under the laws of the State of North Carolina, and is and was at all times herein mentioned, the owner of a line of railroad extending from Goldsboro to Greensboro, North Carolina, to Charlotte, North [fol. 2] Carolina, and defendant had, prior to the times herein mentioned, leased its said road, road-bed, and all equipment and property for a term not yet expired to the Southern Railway Company, a corporation duly organized and existing under the laws of Virginia, for the purpose of transporting passengers and freight

thereon; and at all the times herein mentioned, said lessee was in possession of said railroad under said lease, operating the same under the Director General of Railways of the U. S., pursuant to the Act of Congress in such cases made and provided.

That on February 3, 1920, about 12:00, plaintiff's intestate was so badly injured that she died shortly thereafter, caused by the negligence of defendant; that the facts constituting said negligence were as follows:

On said day, about 12:00 noon, while it was raining heavily, plaintiff's intestate became and was a passenger in the laundry motor wagon or truck of the Columbia Laundry of Greensboro, North Carolina, driven by one Tuttle, employed by said laundry, and was being conveyed from her home on Oakland Avenue, Greensboro, North Carolina, which is a public highway and also a street of the city of Greensboro, running north and south, parallel with and in close proximity to said railroad to the plant of said laundry company, where she proposed to enter into the employment of said laundry company; that said wagon proceeded along Oakland Avenue travelling north toward Greensboro Station, a distance of about 400 yards to its intersection with Highland Avenue, a public highway and also a street of the city of Greensboro; said truck then turned into Highland Avenue, traveling easterly about a right angle with said railroad, going along the said Highland Avenue about 30 feet to the point where the said Highland Avenue crossed three tracks of the defendant at grade within the city limits of Greensboro; when said wagon started over said crossing and when about one-half way over and upon the middle track of defendant railroad, an engine of defendant's lessee, the Southern Railway Cmpany, pro- [fol. 3] ceeding rapidly from Pomona Yards in a northerly direction toward Greensboro Station, collided with said truck and by the impact of said collision, Maggie Barber, intestate of plaintiff was stricken, and so badly injured that she died from her injuries within a short time; that the persons in charge of said engine were negligent in the following particulars:

(a) Two engines coupled together were proceeding along said track at an excessive and unlawful rate of speed, in violation *with* the ordinance, Section 495 of the City of Greensboro, which provides, "That no railroad engine or train shall run or be propelled at a greater speed than twenty miles per hour, in the city;" and also in violation of the defendant's common law duty, not to travel or propel its engines at an excessive, dangerous and unnecessary speed and manner under all of the circumstances of this case, while approaching this well known and long established grade crossing:

(b) The said person in charge of said engine had cut off steam and was coasting down a steep grade sloping toward Greensboro Station at this point for some distances south thereof, and the ordinary noise made by engine proceeding under its own steam was absent:

(c) The persons on said engine failed and neglected to keep a proper and adequate lookout when approaching said crossing;

(d) The persons in charge of said engine failed to give any proper and adequate signal of its approach to said crossing.

5. That the negligence of the defendant's lessee as aforesaid was the proximate cause of the death of plaintiff's intestate, who was a young woman with good health, excellent character, industrious habits, and about 23 years of age.

6. That by reason of the killing of plaintiff's intestate by the negligence of defendant's lessee, as aforesaid, plaintiff has been damaged and sustained loss in the sum of $25,000.

Wherefore, plaintiff demands judgment against the defendant in [fol. 4] the sum of $25,000 and the costs of this action.

This — day of ——, 1920.

W. P. Bynum, R. C. Strudwick, Attorneys for Plaintiff.

(Filed Mch. 31, 1920. M. W. Gant, C. S. C.)

ANSWER

The defendant, answering the complaint of the plaintiff, says:

1. That the allegations of article 1 are admitted.

2. That the allegations of article 2 are admitted.

3. That it is true as alleged in article 3 of the complaint that the defendant is a corporation duly organized and existing under the laws of the State of North Carolina, and is the owner of the line of railroad extending from Goldsboro by Greensboro, N. C., to Charlotte, N. C., and that the defendant had, prior to the times mentioned, leased its road, road-bed and equipments and property for a term of years, to the Southern Railway Company, a corporation duly organized and existing under the laws of Virginia, but it is untrue as alleged in said article that at the times mentioned said lessee was in possession of said railroad under said lease, or that it was operating the same under the Director General of Railways. The facts being that said railway with all its equipments and property had been taken over by the Government of the United States, under and by virtue of the acts of Congress, and that the same was being operated by and through the Director General of Railroads, by virtue of said act of Congress and the orders of the President of the United States; and that the agents and employees operating said railroad were those of the Director General of Railroads.

4. That it is true as alleged in article 4 of the complaint, that on February 3rd, 1920, plaintiff's intestate was so badly injured that she died, but it is untrue and denied that her death was caused in any way by the negligence of the defendant, its agents or employees; that the other allegations of said article as therein stated are untrue and are denied.

[fol. 5] 5. That it — untrue as alleged in article 5 of the complaint that the negligence of the defendant's lessee was the proximate cause of the death of the plaintiff's intestate; that as to the

other allegations of article 5, the defendant has no information sufficient to form a belief, and, therefore, denies the same.

6. That the allegations of article 6 of the complaint are untrue and are denied.

Wherefore, the defendant, the North Carolina Railroad, prays that said action be dismissed; that it go without day and recover of the plaintiff the costs of the action to be taxed by the Clerk.

Wilson & Frazier, Attorneys for Defendant.

[File endorsement omitted.]

IN SUPERIOR COURT OF GUILFORD COUNTY

ISSUES AND VERDICT

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?

Answer. Yes.

2. What damage, if any, is the plaintiff entitled to recover of the defendant?

Answer. $2,500.00.

IN SUPERIOR COURT OF GUILFORD COUNTY

JUDGMENT

This cause coming on to be heard upon the issues arising upon the pleadings, and a jury being sworn and empannelled, who for their verdict say:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?

Answer. Yes.

2. What damages, if any, is the plaintiff entitled to recover of the defendant?

Answer. $2,500.00.

It is now, upon motion of attorneys for the plaintiff, considered and adjudged by the Court that the plaintiff do have and recover of and from the defendant the sum of $2,500.00, and the costs of this action to be taxed by the Clerk.

This the — day of April, 1921.

T. B. Finley, Judge Presiding.

[fol. 6] IN SUPERIOR COURT OF GUILFORD COUNTY

MOTION TO SET ASIDE VERDICT AND ORDER OVERRULING SAME

In this case the defendant in open Court moves to set aside the verdict as being against the greater weight of the testimony and for errors to be assigned; motion overruled.

Defendant excepts.

Judgment signed as set forth in the record.

Defendant excepts, and in open Court gives notice of appeal to the Supreme Court. Further notice waived. Appeal bond fixed in the sum of $50. Defendant allowed 60 days to make up and serve case on appeal. Plaintiff allowed 60 days thereafter to serve counter-case or file exceptions.

IN SUPERIOR COURT OF GUILFORD COUNTY

NOTATION RE SUMMONS

(Summons, to sheriff of Mecklenburg County, upon North Carolina Railroad, appears in the original transcript, bearing following endorsement: "Served Feb. 14, 1922, by delivering to Wade H. Harris, President N. C. R. R. Co. a copy of this summons and of the complaint in this action. W. O. Cochrane, Sheriff of Mecklenburg County, by J. E. Hunter, D. S." said summons being dated Feb. 8th, 1922.)

IN SUPERIOR COURT OF GUILFORD COUNTY

COMPLAINT FOR EXECUTION—Filed Feb. 8, 1922

Plaintiff, complaining of defendant, alleges:

1. That on the 21st day of March, 1921, in the Superior Court of Guilford County, North Carolina, a judgment was duly given and made by said Court in favor of this plaintiff and against the defendant herein, in an action in said Court pending, wherein this plaintiff was plaintiff and said defendant was defendant, for the sum of $2,500.00 with interest thereon from March 21st, 1921, at six per cent per annum till paid, and for $93.65 costs of action.

2. That said judgment remains wholly unpaid.

Wherefore, plaintiff demands judgment against defendant for $2,500.00, with interest thereon from 21st March, 1921, at six per cent per annum until paid, for $93.65 costs of former action, and for the costs of this action to be taxed.

R. C. Strudwick, W. P. Bynum, Attorneys for Plaintiff.

[fol. 7] [File endorsement omitted.]

IN SUPERIOR COURT OF GUILFORD COUNTY

ANSWER—Filed March 3, 1922

The defendant, answering the complaint of the plaintiff, says:

1. That it is true that on the 21st day of March, 1921, a judgment was entered in favor of the plaintiff and against the defendant, for the sum of $2,500 with interest thereon from March 21st, 1921, at six per cent per annum till paid, and for $93.65 costs. That the defendant denies that the same was legal or binding upon the defendant, as the same was obtained for the wrongful death of the plaintiff's intestate, caused by the negligence of the employees and agents of the Government of the United States, while the properties of the defendant were being operated and controlled by the Director General of Railroads, under and by virtue of the acts of Congress and the orders of the President of the United States, and that said judgment, by reason thereof, is illegal and void.

2. That the allegation of article 2 is admitted.

Further Defense

The defendant, further answering the complaint of the plaintiff, and for a further defense, says:

1. That on January 1st, 1918, all the lines of the Southern Railway Company, owned, controlled and operated by it, a part of which were the lines of the defendant, the North Carolina Railroad Company (the Southern Railway Company being the lessee thereof), together with its locomotives, engines, cars and all other equipment, were taken over by the United States of America, and since that date, and up to and including the date of the alleged injury and death of plaintiff's intestate (for which the judgment mentioned in the complaint was obtained), all of said lines, yards, switch tracks, engines and other equipment were continuously in the possession of and operated and controlled by the Director General of Railroads [fol. 8] of the United States, such possession and control by such Director General being pursuant to certain acts of Congress and proclamations of the President of the United States, made pursuant to authority duly vested in him; and at the time alleged in the original complaint (when the injury and death occurred), none of the persons in charge of or on the train, engine or cars referred to were in the employ of this defendant or of its lessee, the Southern Railway Company, nor did any of the agents or employees of this defendant or its lessee have any authority or control over the engine, train or car referred to, or over the premises where said injuries were received, and this defendant says that to hold it liable for the death and injury of the plaintiff's intestate, and to the payment of the judgment mentioned in the complaint, would be to take its prop-

erty without due process of law, in violation of the Constitution of North Carolina and of the United States, and also in violation of the orders of the President of the United States and the Acts of Congress, particularly of the Act known as the Transportation Act of 1920.

Wherefore, the defendant, having fully answered, prays that the action be dismissed, and that it go hence without day and recover of the plaintiff the costs of the action, to be taxed by the Clerk.

Wilson & Frazier, Attorneys for Defendant.

[File endorsement omitted.]

IN SUPERIOR COURT OF GUILFORD COUNTY

AMENDMENT AND SUPPLEMENTAL ANSWER—Filed March 20, 1922

The defendant, supplementing its answer filed in this cause and further answering the complaint of the plaintiff, says:

1. That the judgment of the Superior Court of Guilford County, rendered March 21, 1921, for $2,500.00, with interest from that date at six per cent, plus $93.65 costs, which is the basis of the complaint in this action, was a judgment rendered in this same Court, namely [fol. 9] the Superior Court of Guilford County, North Carolina, between the same parties, namely, P. M. King, Administrator of Maggie Barber, plaintiff, and North Carolina Railroad Company, defendant, summons in said suit being dated March 8th, 1920, and served March 9, 1920, on a case of action arising out of fatal injury to Maggie Barber, at Greensboro, N. C., Feb. 3, 1920; that this present action, therefore, is an action brought to recover judgment in this Court upon a judgment already rendered in this Court, which said judgment was rendered less than one year ago and is, therefore, to all intents and purposes a live judgment and not one to expire by limitation or about to become subject to any other condition that a judgment in the present action could cure. The defendant, therefore, asserts that the plaintiff has no standing in this Court under these circumstances.

If the plaintiff is permitted to pursue this second suit to a finality, and if he should secure a judgment herein, he could institute a third and successive suits, and there would be no end to the matter. The defendant denies that the plaintiff has the right to proceed in this Court in the present action and to cause the defendant to incur costs in defense when there is already a judgment outstanding in the same matter in this same Court. If he is permitted to continue to sue in successive suits, it will cause a multiplicity of suits in one cause of action and will cause defendant unnecessary expense and inconvenience.

2. The defendant further says that the reasons of the plaintiff's proceeding by this second cause of action to ask for a judgment upon

the judgment in the first cause of action described in Section 1 above, is unknown to it; but it is believed that the purpose of the plaintiff is to try to evade in some way the provisions of Section 206 (g) of the Act of Congress known as the Transportation Action of 1920 that:

[fol. 10] "No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control."

The judgment sued upon in this case was a judgment recovered in a cause of action which arose out of the possession, use, control and operation of the railroad lines of the defendant by the President under Federal control, and hence under the section above quoted no execution or process can be levied upon the property of the defendant. The judgment is therefore unenforceable. If, therefore, it be the purpose of the plaintiff in this case to endeavor to nullify and evade the express provisions of the Act of Congress, the defendant asks that he be restrained from asking for or having issued any execution or other process to enforce the collection of the judgment sued upon. To permit the plaintiff to subject the property of the defendant to the satisfaction of the judgment in this case, which judgment was rendered in a cause of action which arose during the possession, use and control of the properties of the defendant by the Government of the United States under an Act of Congress and the Proclamation of the President, would be to take its property without due process of law, and would amount, in effect, to confiscation.

The defendant also asserts that the remedy of this plaintiff, if any, arises under Section 206 (a) of the Transportation Act of 1920, which reads as follows:

"Actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the President of the railroad system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal [fol. 11] control, could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act."

that this action at law is based on a cause of action which arose out of the possession, use and operation by the President of the railroad of the defendant, and such action can only be brought against the agent designated by the President, provided it is brought within the time prescribed by the act.

Wherefore, the defendant, having fully answered, prays that the action be dismissed at the cost of the plaintiff, and that the plaintiff be enjoined and restrained from prosecuting this action against the defendant, and that he be further restrained from applying for any execution or other process to enforce the collection of the judgment sued upon.

Wilson & Frazier, Attorneys for Defendant.

[File endorsement omitted.]

In Superior Court of Guilford County

Demurrer and Motion for Judgment—Filed Feb. 27, 1922

Comes now the plaintiff and demurs to the Answer of defendant herein, upon the ground that the matters and things alleged in said Answer were set up or might have been set up in the defense in the original action, and this judgment sued upon is res adjudicata as to all such matters; also plaintiff moves for judgment upon the pleadings.

W. P. Bynum, R. C. Strudwick, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 12] In Superior Court of Guilford County

Judgment—Filed April, 1922

This cause coming on to be heard upon plaintiff's demurrer to the answer of defendant, it is now considered and adjudged by the Court that said demurrer be and the same is hereby sustained. It is further considered and adjudged by the Court that the plaintiff have and recover of defendant, $2,500.00, with interest thereon from March 21, 1921, and the further sum of $95.65 with interest from same date and the cost of this action to be taxed.

B. F. Long, Judge, Presiding.

In Superior Court of Guilford County

Defendant's Statement Case on Appeal

This was a civil action brought by the plaintiff against the defendant, upon a judgment theretofore obtained in the Superior Court of Guilford County.

The following is a copy of the judgment roll of the action first instituted, and in which said judgment sued on was obtained.

(The Clerk will here copy the judgment roll, in P. M. King, Administration of Maggie Barber, deceased.)

The following are copies of the pleadings in the case at bar.

(Here copy the pleadings.)

The plaintiff, before the hearing, filed the following demurrer and motion for judgment on the pleadings (See Record page 11):

The defendant moves the Court to dismiss the action. The Court, upon hearing the motion to dismiss the action, declined the same, and defendant excepted.

Exception No. 1.

The Court, upon hearing the demurrer and motion of the plaintiff for judgment, sustained said demurrer and motion for judgment. Defendant excepted.

Exception No. 2.

The Court signed the following judgment (see R. p. 12 above):

The defendant excepted.

Exception No. 3.

[fol. 13] IN SUPERIOR COURT OF GUILFORD COUNTY

ASSIGNMENTS OF ERROR

First Exception and Assignment of Error

For that the Court declined to dismiss the action, upon motion of the defendant (R., p. 12).

Second Exception and Assignment of Error

For that the Court sustained the demurrer and motion of the plaintiff for judgment (R., p. 12).

Third Exception and Assignment of Error

For that the Court signed the judgment set out above, and in the record.

Wilson & Frazier, Attorneys for Defendant.

Service of the above case on appeal accepted this the 23rd day of May, 1922.

R. C. Strudwick, Attorney for Plaintiff.

No counter-case filed. M. W. Gant, Clerk.

(Transcript certified by Clerk Superior Court of Guilford County, September 25th, 1922.)

[fol. 14] IN SUPREME COURT OF NORTH CAROLINA

DOCKET ENTRIES

Appeal docketed 26 September, 1922; case argued 31 October, 1 November, 1922; opinion 29 November, 1922, by Hoke, J., as follows:

[fol. 15] IN SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1922

#390

P. M. KING, Administrator,

v.

NORTH CAROLINA RAILROAD COMPANY

GUILFORD

OPINION

Civil action to recover on a judgment in favor of plaintiff against defendant road for $2,500.00 damages for negligent killing of plaintiff's intestate by defendant's lessee, the Southern Railroad Co., heard on demurrer to the answer of defendant before his Honor, B. F. Long, Judge, at April Term, 1922, of the Superior Court of Guilford County.

From the facts as presented in the pleading, it appears that on February 3, 1920, plaintiff's intestate was killed by negligence of Southern Railroad, its employees and agents while holding the defendant's railroad under a lease of defendant company, and operating same under and by virtue of defendant's franchise. That plaintiff having duly qualified as administrator of deceased, instituted his action against defendant for said alleged negligent killing, and filed his complaint therein, setting forth the occurrence in detail and the facts tending to impute liability therefor to defendant. Defendant answered, denying any negligence on the part of its lessee as proximate cause of intestate's death, and alleging further that at the time of said killing defendant's road was not in possession of or being operated by its lessee, but was under the control and management of the government of the United States through the Director General, &c., and pursuant to the federal legislation appertaining to the subject and the administrative orders made under and by virtue of same.

On these averments the cause was submitted to the jury at March Term, 1921 of said Court and verdict rendered on the following issues:

[fol. 16] "1. Was plaintiff's intestate killed by the negligence of defendant as alleged in the complaint?

Ans. Yes.

2. What damages if any is plaintiff entitled to recover?

Ans. $2,500.00."

Judgment on the verdict for plaintiff. Defendant excepted and prayed an appeal, which was never perfected or further prosecuted. That said judgment not having been paid, plaintiff instituted the present action at March Term, 1922, and filed complaint therein, avering the existence of said judgment, that same remains wholly unpaid, and demanding judgment for the $2,500.00 and interest. To this complaint defendant answered admitting the recovery and existence of the judgment sued on, but alleged that same was not a valid or binding judgment because it was obtained for the wrongful death of intestate caused by the negligence of the employees and agents of the government of the United States while the properties of defendant were being operated and controlled by the Director General of Railroads under and by virtue of the Acts of Congress and the orders of the President of the United States and for that reason said judgment is illegal and void. Defendant alleged further in effect that this alleged negligent killing took place when its road and all equipment &c. was in control and charge of the government under the Acts of Congress and orders aforesaid and at a time when none of the agents and employees &c. of defendant or its lessees were engaged in operating said road or in any way responsible for said death, and to hold it liable for such an injury under such circumstances would be to take defendant's property without due process of law &c. And in supplemental answer filed by leave of Court, alleged further that the present action on the judgment in behalf of defendant was in the endeavor to evade in some way the provision contained in the Act of Congress known as the Transportation Act of 1920, section 206 (g) in terms as follows:

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property [fol. 17] of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control."

And defendant pleads further provisions of said Transportation Act in bar of recovery on the judgment.

To which said answer plaintiff files demurrer in terms as follows:

"Comes now the plaintiff and demurs to the answer of defendant herein, upon the ground that the matters and things alleged in said answer were set up or might have been set up in the defense in the original action, and this judgment sued upon is res adjudicata as to all such matters; also plaintiff moves for judgment upon the pleadings."

There was judgment sustaining demurrer in terms as follows:

"This cause coming on to be heard upon plaintiff's demurrer to the answer of defendant, it is now considered and adjudged by the Court that said demurrer be, and the same is hereby sustained. It is further considered and adjudged by the Court that the plaintiff have

and recover of defendant $2,500.00, with interest thereon from March 21, 1921 and the further sum of $95.65 with interest from same date and the cost of this action to be taxed".

Defendant excepted and appealed.
W. P. Bynum, R. C. Strudwick, for plaintiff.
Wilson & Frazier for defendant.

HOKE, Judge:

It appears from an inspection of the record that plaintiff holds a judgment of the Superior Court against defendant for $2,500.00 damages and costs, purporting to be a final determination of the rights of these litigants, unchallenged by appeal or other procedure in the cause wherein the same was entered. The Court being with us one of general jurisdiction, every reasonable intendment is presumed in favor of the validity of its judgment and the same may not be impeached collaterally except for lack of jurisdiction of the [fol. 18] cause or the parties, apparent on the face of the record. Caveness v. Hunt, Recr., 180 N. C. p. 384; Stocks v. Stocks, 179 N. C. p. 288; Moore v. Packer & Harrison, 174 N. C. p. 665; Settle v. Settle, 141 N. C. pp. 553-573; Carter, Admr. v. Rountree, 109 N. C. p. 29; Doyle v. Brown, 72 N. C. p. 393; Harvey v. Tyler, 69 U. S. pp. 328-343; 11 Cyc. p. 691.

And in case jurisdiction has attached, the binding force and conclusiveness of such judgment is in no way impaired because the same has been erroneously allowed, though the error may be undoubted and apparent on the face of the record. McNitt v. Turner, 83 U. S. pp. 352-366; Cooper v. Reynolds, 77 U. S. at page 316; Grignon's, lessee, v. Astor et al, 2 U. S. pp. 319 & 340; Weeks v. McPhail, 128 N. C. p. 130; Worrel v. Rountree, 109 N. C., supra; Stillman v. Williams, 91 N. C. pp. 483-486; McKee v. Angel, 90 N. C. p. 60; Jennings v. Stafford, 23 N. C. p. 404; Franklin Union No. 4 v. People, 220 Ill. p. 355.

In McNitt v. Turner, supra, at p. 366, the correct principle is stated as follows:

"It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceedings being coram judice, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. The order of sale before us is within this rule. Grignon's Lessee v. Astor et al. was, like this, a case of a sale by an administrator. In that case this court said: 'The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law.' "

[fol. 19] And in Stillman v. Williams, 91 N. C. supra, at page 486, Merrimon, Judge, delivering the opinion, said:

"Although a judgment be irregular or erroneous, yet if the Court granting it had jurisdiction of the parties and the subject matter, it cannot be attacked collaterally for such irregularity or error."

We do not understand that appellant desires to question the general principles to which we have referred, but it is insisted that there is a lack of jurisdiction of the subject matter in case of the judgment here sued on by reason of the Acts of Congress and executive and administrative orders pursuant thereto, by which this and other roads in continental United States were taken over by the government as a necessary step in the successful prosecution of the recent war, and particularly by reason of General Order No. 50 in which the Director General in charge and control of the roads under these legislative and executive orders, provided among other things:

"That actions at law, suits in equity and proceedings in admiralty hereafter brought in any court based on contracts binding upon the Director General of Railroads, claims for death or injury to the person or for loss or damage to property arising since December 31, 1917, and growing out of the possession, use and control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceedings but for Federl control might have been brought against the carrier company shall be brought against William G. McAdoo, Director General of Railroads and not otherwise, &c.

"Second, pleadings in all such actions at law, &c., now pending against the carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising out of the operation &c., may on application be amended by substituting the Director General for the carrier company as party defendant and dismissing the carrier."

Speaking in general terms, jurisdiction has been defined as the power "lawfully conferred upon a Court to deal with the general subject involved in the litigation," and as to the subject matter is [fol. 20] said to exist wherever the court has jurisdiction of the class of cases to which the particular case belongs." Cooper v. Reynolds, 77 U. S. pp. 308-316; O'Brien v. The People, 216 Ill. p. 354; St. Louis &c. R. R. Co. v. Lowdes, 138 Mo. p. 533; 7 Enc. Supreme Court Reports p. 738.

As heretofore stated, our Superior Courts are courts of General jurisdiction, having power original or appellate to hear and determine all criminal causes and all civil causes in law or equity arising and existent within the state. Rhyne v. Lipscombe, 122 N. C. p. 650. And while these orders when made pursuant to legislation by Congress on the subject presented, have been fully sustained and approved as controlling on the rights of the parties when and to the extent that the same properly apply. Missouri Pacific v. Ault, 256 U. S. p. 554; Northern Pacific R. R. v. North Dakota, 250 U. S. p.

135, they do not in our opinion create or present here any jurisdictional question, but were only intended to afford immunity from suit when properly pleaded by the carriers and insisted on and maintained according to the course and practice of the court.

This order No. 50, upon which appellant chiefly relies, clearly and in express terms contemplates that as a matter of jurisdiction the court may proceed to hear and determine the cause. A perusal of the Federal Control Acts will disclose that there were suits that could still be maintained against the carrier notwithstanding federal control, and prosecuted to the rendition of the judgment. Again, the president is authorized from time to time by order or contract to withdraw certain roads or portions of roads from the effect and operation of such control, 40 Statutes at Large, Chapter 25, Section 14, and the Court of necessity must determine whether a given action before it comes within the effect and operation of the order in question, and this of itself would recognize jurisdictional power to deal with the controversy. This view finds support, we think, in Mo. Pacific R. R. v. Ault, supra, wherein Associate Justice Brandeis for the Court, in an opinion upholding the validity of order No. 50 [fol. 21] and denying liability of the company for actions of this character refers to the fact that the immunity had been "seasonably claimed." And again, in the opinion, the conditions presented are likened to the case of a corporation in the hands of a receiver, where it is well understood that the appointment of a receiver does not have the effect at all of dissolving the corporation, and that the judgment of a court of competent jurisdiction obtained against the company will conclude both the corporation and the receiver, unless and until the same is set aside by motion in the cause or other direct proceedings. Pringer v. Woolworth, 90 N. Y. p. 502; Beach on Receivers, Section 468. And it may be noted that in the recent cases of Supreme Court of the United States on this subject, wherein liability of the company was denied for injuries arising under and by reason of federal control of the roads, Ault v. R. R. 256 U. S. p. 554; Western Union v. Boston, 256 U. S. p. 662; N. C. R. R. v. Lee, Admr., the immunity from liability was seasonably pled and was being insisted on and maintained according to course and practice of the Court, and in no*n* of them so far as examined was there a suggestion of a want of jurisdiction in the Court to hear and determine the cause.

It is further contended that plaintiffs may not be allowed to further prosecute this suit because of the Act of Congress terminating Federal Control, 41 Statutes at Large, Part 1, Chapter 91, and which contains among others, in Section 206 (g), the provision that "No execution or process other than a judgment recovered by the United States shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained, grew out of the possession, use, control or operation of the railroad or system of transportation by the President under Federal Control, &c."

[fol. 22] It might suffice to say in answer to this position that plaintiff thus far has not undertaken to levy any process or execution against the property of the defendant road, and his proceedings, therefore, does not come within the literal terms of the provisions on which he here relies, but inasmuch as the answer contains averment that plaintiff is wrongfully seeking in this present suit to avoid the force and effect of the statutory provision just quoted, we consider it pertinent to say that in our opinion the judgment sued on does not come within the inhibition as stated.

There are two of these inhibitions appearing in the Federal Legislation on this subject, the first in Chapter 25, Sec. 10, Laws of 1918, 40 Statutes at Large p. 456. This Section, after providing in effect that carriers while under Federal Control were subject to all laws and liabilities of carriers, and that actions might be brought against them and judgments recovered "as now provided by law," closes with the provision: "But no process mesne or final shall be levied against any property under such Federal Control."

This provision was clearly inserted to protect the properties taken over from physical interference at the instance of creditors or third persons and as necessary to the efficient user of the roads by the government in the successful prosecution of the war and from its terms and purposes, would cease when such necessity no longer existed and the governmental control had lawfully terminated.

The second inhibition which is here pleaded and relied upon by defendant appears in the Statute referred to terminating governmental control of the roads, 41 Statutes at Large, Chapter 91. That Statute, after providing in Section 200, that "on and after March 1, 1920, the President shall relinquish the possession and control of the railroads taken over by the government, and cease the use and operation thereof," in Section 206, Clause A, provides in effect that action at law, suits in equity, and proceedings in admiralty based on causes of action growing out of Federal Control, may be brought [fol. 23] against an agent to be appointed by the President with the limitation that such suits etc. should be brought not later than two years from the passage of the act. Clause B directs that process in these actions may be served on any agent or officer of the carrier or on some officer or agent to be designated by the President. Clause C provides for prosecution of claims for reparation to the carrier before the Interstate Commerce Commission by reason of any unreasonable or unjust rates etc., enforced to the carrier's prejudice during such Federal Control. Clause D, that actions, suits, proceedings and reparations above described, pending at the termination of Federal Control, may be prosecuted to final judgment by substituting the agent designated by the President as party Clause E; provides for payment of such judgment out of the revolving fund created by the Act. Clause G, heretofore quoted, prohibits the levy of execution or other process against the property of the carrier when the cause of action etc. grew out of possession and control of the roads by the President.

From a perusal of these sections of the Act, and a proper consideration of its terms and purpose, we are of opinion that this second

inhibition applies and was intended to apply to the judgments provided for by the Act itself or at most to these and other judgments for such causes of action which had been permitted and obtained against the Director General under other and cognate Federal Legislation. The first inhibition, as stated, being to protect the roads from physical interference by third persons, creditors or other, while in possession and control of the government, and the second to protect the carriers in the possession and control of their own roads from physical interference by reason of any actions or judgments provided for and allowed by the government, but this legislation in our view was never intended to protect the carriers from judgments in independent suits by claimants where they have failed to plead or properly insist on the immunity from liability which had been provided for their protection. The government has made provision by its legislation to protect the carriers from molestation by reason of any judgments it has authorized, and provided for, but it has not [fol. 24] undertaken as guardian ad litem to avoid or destroy the force and effect of independent judgments against which the carrier has neglected or failed to interpose his proper defenses.

Plaintiff, then, holding a final judgment of a court of competent jurisdiction for $2,500.00, unpaid and unchallenged by appeal or any direct proceedings, is entitled to sue on the same, regardless of his right to issue execution thereon, the protection in this jurisdiction against persistent and harassing litigation of this character being a statutory provision that no such action shall be instituted more than once. C. S. Sec. 437-601; 2nd Black on Judgments, Sec. 958; 23 Cyc., 1502. On the entire record we are of opinion that his Honor made correct decision in sustaining plaintiff's demurrer to the answer and his judgment to that effect is affirmed.

Affirmed.

[fol. 26] IN SUPREME COURT OF NORTH CAROLINA, SPRING TERM, 1924

#385

[Title omitted]

Guilford County

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court of Guilford County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. A. Hoke, Associate Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed.

And it is considered and adjudged further, that the plaintiff North Carolina Railroad Company and surety to appeal bond, do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty-seven 65/100 ($27.65) Dollars and execution issue therefor.

[fol. 27] IN SUPREME COURT OF NORTH CAROLINA

CLERK'S CERTIFICATE

I, Edward C. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a true and correct copy of the proceedings in this Court in the case entitled P. M. King, admr. of Maggie Barber, deceased, vs. North Carolina Railroad Co., decided at the Fall Term, 1922, of this Court.

Witness my hand and seal of said Court at office in Raleigh this 3 March, 1924.

Edward C. Seawell, Clerk of the Supreme Court of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 28] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 879

NORTH CAROLINA RAILROAD COMPANY, Petitioner,

vs.

C. D. STORY, Sheriff of Alamance County, North Carolina, et al.

On Petition for Writ of Certiorari to the Supreme Court of the State of North Carolina

ORDER ALLOWING WRIT OF CERTIORARI—Filed April 7, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of North Carolina and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

April 7, 1924.

SUPREME COURT O THE UNITED STATES, OCTOBER TERM, 1924

No. 322.

NORTH CAROLINA RAILROAD COMPANY, Petitioner,

vs.

C. D. STORY, Sheriff of Alamance County, North Carolina, and P. M. King, Administrator, etc.

It appearing to counsel for both parties to this cause that the Transcript of Record in this cause, as printed in the Supreme Court of the United States, contains an error in that the matter on printed page 15, beginning with the line reading:

"[fol. 22] It might suffice to say in answer to this position that"

and ending with the word, "Affirmed," fourth line, printed page 17, is transposed with the subject matter found on printed page 32, beginning with the line:

"[fol. 22] It is now considered and adjudged by the Court that"

and ending with the word, "Affirmed," twenty-second line, page 35.

And it further appearing that this error did not occur in the printing of the transcript in the Supreme Court of the United States, but occurs in the transcript as forwarded to the Supreme Court by the Clerk of the Supreme Court of North Carolina:

We stipulate and agree that the correction herein above indicated may be made and request the Clerk of the Supreme Court of the United States to make the same.

S. R. Prince, Counsel for Petitioner. Wm. P. Bynum, R. C. Strudwick, Counsel for Respondent.

16 Jany., 1925.

[Endorsed:] No. 322. October Term, 1924. North Carolina R. R. Co., Petitioner, vs. C. D. Story, Sheriff, et al. Stipulation of Counsel Respecting Correction in Record.

[Endorsed:] File No. 30,189. Supreme Court U. S., October Term, 1924. Term No. 322. North Carolina Railroad Company, Petitioner, vs. C. D. Story, Sheriff, &c., et al. Stipulation for correction of certified and printed records. Filed January 20th, 1925.

(13)

Office Supreme Court, U. S.
FILED
MAR 12 1924
WM. R. STANSBURY
CLERK

No. 322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
Respondents.

Petition, Notice, and Motion for Writ of Certiorari to the Supreme Court of the State of North Carolina and Brief in Support Thereof.

S. R. PRINCE,
H. O'B. COOPER,
W. M. HENDREN,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,
vs.
C. D. STORY, SHERIFF OF ALAMANCE COUNTY, N. C., AND P. M. KING, ADMINISTRATOR, ETC.,
Respondents.

To W. P. Bynum and R. C. Strudwick, Attorneys of Record for Respondents in the above case:

This is to notify you that the Petitioner will, on the 17th day of March, 1924, present to the Supreme Court of the United States, at its court room at Washington, D. C., Petitioner's motion for writ of certiorari upon its verified petition and a copy of the entire record in this case. A copy of the said petition and brief in support of the same are herewith delivered to you this 2d day of March, 1924.

NORTH CAROLINA RAILROAD COMPANY,
S. R. PRINCE,
H. O'B. COOPER,
W. M. HENDREN,
Counsel.

Receipt of the above notice, petition, and brief is acknowledged this — day of March, 1924.

.....

.....

Attorneys for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,
vs.
C. D. STORY, SHERIFF OF ALAMANCE COUNTY, N. C., AND P. M. KING, ADMINISTRATOR, ETC.,
Respondents.

Motion for Writ of Certiorari to the Supreme Court of the State of North Carolina.

Now comes the North Carolina Railroad Company, Petitioner, by its counsel, and moves this Honorable Court that it will by certiorari or other process directed to the Honorable Judges of the Supreme Court of the State of North Carolina require said Court to certify to this Court for its review and determination a certain cause in the said Supreme Court of North Carolina lately pending, wherein Petitioner, North Carolina Railroad Company, was appellant, and Story, Sheriff, and King, Administrator, were appellees, and to that end they now present herewith their petition and brief, with a certified copy of the entire record in said cause in said Supreme Court of North Carolina.

S. R. PRINCE,
H. O'B. COOPER,
W. M. HENDREN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

C. D. STORY, SHERIFF OF ALAMANCE COUNTY, N. C., AND P. M. KING, ADMINISTRATOR, ETC.
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of North Carolina.

To the Honorable, the Supreme Court of the United States:

The petition of the North Carolina Railroad Company, Petitioner, respectfully shows to this Honorable Court:

Summary of the Case.

This is a suit to enjoin the levy of execution on the property of Petitioner, the right to prevail in the suit being claimed under Section 206, paragraph (g), Transportation Act, 1920, reading:

"(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

Petitioner's verified bill (Rec. p. 1) in this case and Respondent's verified answer (Rec. p. 11), used as affidavits under State practice, disclose:

1. March 9, 1920, respondent King, Administrator of Maggie Barber, filed suit in the Superior Court of Guilford County, N. C., against the North Carolina Railroad Company to recover damages for fatal injury to Maggie Barber at Greensboro, N. C., February 3, 1920, sustained in a collision between an automobile in which she was riding and a train. In that suit it was alleged in the complaint that the North Carolina Railroad Company owned the railroad where the accident occurred, that it had theretofore leased its railroad to Southern Railway Company, and that at all the times mentioned in the complaint the lessee was in possession of said railroad, operating the same "under the Director General of Railroads of the United States pursuant to the Act of Congress in such case made and provided." It was charged that the negligence of the defendant's lessee as aforesaid was the proximate cause of the death of plaintiff's intestate.

Petitioner's answer in that first suit denied that the death was caused by the negligence of defendant or its employes or was caused by the negligence of its

lessee or its employes, and set up that the lessee was not at the time operating the railroad, and stated:

> "The facts being that said Railway with all its equipment and property had been taken over by the Government of the United States under and by virtue of the Acts of Congress, and that the same was being operated by and through the Director General of Railroads, by virtue of said Act of Congress and the orders of the President of the United States; and that the agents and employes operating said railroad were those of the Director General of Railroads."

The case was submitted to a jury, which gave a verdict of $2,500.00 damages against defendant, and there was judgment accordingly in April, 1921. The North Carolina Railroad Company moved in open court to set aside the verdict. The motion was overruled. Defendant excepted and judgment as above was signed. Defendant excepted and in open court gave notice of appeal to the Supreme Court. Further notice was waived. Appeal bond was fixed at $50.00 and defendant allowed sixty days to make up and serve case on appeal. This appeal was not perfected. The sixty days expired June 2, 1921, and the statement of case on appeal was not served until June 7, 1921—five days over the time. The bill in this case shows that this was on account of the sickness of counsel representing the defendant (Rec. p. 3). The answer does not deny this. It states that the time expired without agreement for further extension and that, on request of the Railroad Company, plaintiff refused to extend the time and, on motion of the plaintiff, the Judge struck from the files

the statement of case on appeal which had been filed by the North Carolina Railroad, as stated (Rec. pp. 11-12).

2. February 8, 1922, no execution having been issued on the first judgment, a second suit was filed by King, Administrator, against the North Carolina Railroad Company, setting up that judgment was rendered in favor of plaintiff and against defendant in the sum of $2,500.00 and costs; that said judgment remains wholly unpaid. "Wherefore plaintiff demands judgment against defendant for $2,500.00 with interest thereon from March 21, 1921, at 6 per cent per annum until paid, for $93.65 costs of former action, and for the costs of this action to be taxed."

To this second suit petitioner herein answered, admitting the entry of judgment referred to, but denying that the same was legal or binding upon defendant for the reason that the death was caused by the negligence of the employes and agents of the Director General of Railroads. It was also set up in the answer in that case that on January 1, 1918, all the lines of the Southern Railway Company, including the line of the North Carolina Railroad, with its equipment, were taken over by the United States of America, and that on the date of the alleged injury all of the said lines, tracks, engines, etc., were in the possession of and operated by the Director General of Railroads of the United States under Act of Congress and that none of the persons in charge of the train were in the employ of the defendant or of its lessee. The North Carolina Railroad further answered that the reasons of the plaintiff for proceeding to ask a judgment upon the judgment in the first cause of action were unknown,

but it was believed that the purpose was to evade the provisions of Section 206(g) of the Act of Congress known as the Transportation Act of 1920, reading:

> "No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control."

Defendant asked that plaintiff be restrained from asking for or having issued any execution to enforce the judgment sued upon.

To this answer plaintiff, King, demurred as follows:

> "Comes now the plaintiff and demurs to the Answer of defendant herein, upon the ground that the matters and things alleged in said Answer were set up or might have been set up in the defense in the original action, and this judgment sued upon is *res adjudicata* as to all such matters; also plaintiff moves for judgment upon the pleadings."

The Court sustained the demurrer and rendered judgment in favor of plaintiff against defendant for $2,500.00, with interest, and for the further sum of $95.65, with interest, and for the costs of that action.

The defendant excepted to that judgment and appealed the case to the Supreme Court of North Carolina and assigned as errors the declination of the lower court to dismiss the action, and the action of the Court

in sustaining the demurrer to the answer and in rendering judgment.

The judgment in that case was affirmed by the Supreme Court of North Carolina in an opinion filed November 29, 1922, and reported in 184 N. C. 442.

The respondent, in its brief in that case, said:

> "The defendant then imputes to plaintiff some ulterior purpose in bringing this action. If he had a right to bring it, his purpose in doing so would seem to be immaterial. He also alleges, that if plaintiff should issue execution upon the present judgment, some rights guaranteed to defendant by Acts of Congress or the Constitution of the United States would be infringed.
>
> "The plain answer to this is, that these considerations cannot affect the cause of action stated in the complaint, indeed they do not touch it at all. The only question therein raised, is the right of plaintiff to a judgment thereon. What his purpose is, in asking for what by law, he is entitled to, is not material, neither is it material, nor a question now presented, whether he will hereafter, by execution or otherwise, attempt to collect said judgment, or whether his efforts in that direction, if he makes any, will be successful.
>
> "It will be time enough to decide these questions, if they should hereafter arise; plainly, they constitute no defense to this action upon the first judgment."

The Supreme Court of North Carolina, in its decision, *supra*, at page 448, after stating the contention made by the Railroad Company under Section 206(g), said:

> "It might suffice to say in answer to this posi-

tion that plaintiff thus far has not undertaken to levy any process or execution against the property of the defendant road, and his proceeding, therefore, does not come within the literal terms of the provision on which he here relies, but inasmuch as the answer contains averment that plaintiff is wrongfully seeking in this present suit to avoid the force and effect of the statutory provision just quoted, we consider it pertinent to say that in our opinion the judgment sued on does not come within the inhibition as stated."

The Supreme Court of North Carolina discussed the inhibition against levy of execution and said it was not intended to apply to such judgment. It held finally on this point:

> "Plaintiff, then, holding a final judgment of a court of competent jurisdiction for $2,500, unpaid and unchallenged by appeal or any direct proceedings, is entitled to sue on the same, regardless of his right to issue execution thereon, the protection in this jurisdiction against persistent and harassing litigation of this character being a statutory provision that no such action shall be instituted more than once."

3. The opinion of the Supreme Court of North Carolina was certified to the Superior Court of Guilford County, where, on March 30, 1923, judgment was had in accordance with the certificate of the Supreme Court of North Carolina, adjudging that "execution of said judgment do proceed." The North Carolina Railroad Company opposed the application of King, Administrator, for leave to issue execution and excepted to the order.

Thereafter, on the — day of April, 1923, King, Administrator, obtained an execution from the Clerk of the Superior Court of Guilford County and delivered the same to Story, Sheriff of Alamance County, N. C., who, in accordance with the mandate of said execution, levied the same upon certain real estate of the North Carolina Railroad Company, to-wit, a building in the Town of Burlington occupied by the Secretary and Treasurer of the North Carolina Railroad Company as an office building.

Thereafter, on the 5th day of May, 1923, the North Carolina Railroad Company instituted this action in the Superior Court of Guilford County against Story, Sheriff of Alamance County, and against King, Administrator of Barber, alleging that the execution then in the hands of the Sheriff of Alamance County was illegal and improperly issued, the same being issued in contravention of the Act of Congress known as the Transportation Act and specifically Section 206(g) thereof (Rec. pp. 8-9-10).

It was further alleged that the judgment upon which the execution was issued was a judgment against the North Carolina Railroad Company for the tort of a third person and that to seize and sell the property of the North Carolina Railroad under such circumstances would be confiscation and taking property without due process of law and deny to it the equal protection of the law, contrary to the provisions of the Constitution of the United States (Rec. p. 9).

The prayer of the bill was for an injunction against Story, Sheriff, from selling the property heretofore levied upon and to enjoin the defendants against taking any steps to satisfy the judgment referred to by

execution against the North Carolina Railroad Company (Rec. pp. 10-11).

4. The defendants, respondents here, answered the bill and said:

> "* * * the nature of the first action in the Superior Court of Guilford County of P. M. King, Administrator, against the North Carolina Railroad Company, No. 6788, the pleadings, trial, judgment and subsequent proceedings therein, are such as appear in the record of the said cause which will be produced by the defendants upon the trial of this action and upon the hearing of the motion for a temporary injunction, and any allegations in said paragraph two of said complaint inconsistent therewith are denied.
>
> * * * * * * *
>
> "Answering paragraph three, the defendants say, that the record of the said second action between the said parties, No. 8102, referred to in this paragraph of the complaint, will be produced at the hearing and its contents will then truly appear.
>
> "Any statements in this paragraph of the complaint inconsistent with the said record are denied. The opinion and judgment of the Supreme Court of North Carolina on the said appeal affirming the judgment of the court below was rendered and filed in the said suit on the 29th day of November, 1922, and is reported in Volume 184 of the Reports of the Supreme Court of North Carolina. No effort or action was made or taken by the plaintiff in this suit to have the said judgment of the Supreme Court of North Carolina in the suit referred to reviewed or modified but the plaintiff in this action has acquiesced in the same

until the order rendered by Stack, Judge, March 30, 1923, and marked Exhibit B, was made directing that execution of the said judgment proceed." (Rec. pp. 11-12).

Respondents admitted in the answer the levy of the execution on the property of the petitioner (Rec. p. 12). They averred that the property levied upon was not used by the plaintiff or its lessees for transportation purposes (Rec. p. 13). They averred that all the matters alleged as grounds for injunction had been theretofore adjudicated (Rec. p. 13).

The North Carolina Railroad Company procured from Harding, J., a temporary restraining order, requiring the defendant to show cause before Shaw, J., why said temporary order should not be made permanent (Rec. p. 15). This cause was heard on the 22nd of May, 1923, on the motion of plaintiff to make permanent the temporary restraining order. That motion was denied. The Court continued in force the restraining order pending plaintiff's appeal (Rec. p. 16). The North Carolina Railroad excepted to the refusal of the Court to make the restraining order permanent (Rec. p. 17) and appealed the case to the Supreme Court of North Carolina.

The Supreme Court of North Carolina, on this state of the record, on February 21, 1924, affirmed the judgment and denied plaintiff's request for a stay until application could be made to the Supreme Court of the United States for writ of certiorari.

The Supreme Court of North Carolina, in its opinion found in 184 N. C. 442, erred and deprived *petitioner* of its rights, privileges, and immunities set up and

claimed and found in Section 206(g) of the Act of Congress known as the Transportation Act, 1920, in holding that said Section of the said Act of Congress was not intended to apply to judgments such as the one obtained against your petitioner.

The Supreme Court of North Carolina, in its opinion rendered February 21, 1924, erred and deprived your petitioner of the right, privilege, and immunity set up and claimed by it and found in Section 206(g), Transportation Act, 1920, in holding that *petitioner was concluded* on the question of liability by the two judgments which were unchallenged and that its application for an injunction against execution had been properly refused, and that the inhibition against the levying of execution on judgment was not intended to protect the carrier from judgments in independent suits in which the carrier had failed to interpose its proper defenses and, therefore, the judgment denying the injunction was affirmed.

This writ is sought to correct the error of the Supreme Court of North Carolina in its opinion and judgment in this case above set forth, as will appear from the record accompanying this petition and the opinions of the Supreme Court of North Carolina also accompanying this petition (except that in the 184th N. C., which is found in the printed volume and is not reproduced), and to secure to petitioner the privileges and immunities granted it by Section 206(g) of the Transportation Act.

Petitioner further shows that the said last judgment of the Supreme Court of North Carolina is a judgment of the highest court of that State in which a judgment could be had in this suit and that the said suit involves

a claim by petitioner to rights and immunities under the statute of the United States known as the Transportation Act, which have been finally denied petitioner by the Supreme Court of the State of North Carolina, and that accordingly said judgment is reviewable by this Court by certiorari.

Wherefore, upon due consideration of this petition and the annexed brief, and the certified copy of the record filed herewith, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of North Carolina, commanding that Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings had in this cause, to the end that the same may be reviewed and determined by this Honorable Court under said writ, as is provided by law, and that upon the final consideration of this cause, and of said writ, the said judgment of the Supreme Court of the State of North Carolina be reversed by this Honorable Court, with direction that judgment be rendered therein in favor of petitioner, as prayed for.

Petitioner further prays for such other equitable and general relief as may appertain to this case as it may be competent for this Honorable Court to grant.

S. R. PRINCE,
H. O'B. COOPER,
W. M. HENDREN,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

District of Columbia, City of Washington.

Before me, the undersigned Notary, personally appeared S. R. Prince, who, being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioner herein; that he has read the foregoing application for a writ of certiorari; that all the facts therein stated are true and correct to the best of his knowledge and belief.

S. R. PRINCE.

Sworn to and subscribed before me this 29th day of February, 1924.

HARRY K. PIMPER,
Notary Public, District of Columbia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
Respondents.

Brief in Support of Application for Writ of Certiorari.

This is an application for writ of certiorari to the Supreme Court of North Carolina on the ground that the final judgment of the State Court has deprived petitioner of a right, privilege, or immunity granted it by Section 206 (g) of the Transportation Act, 1920, which Section reads as follows:

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

Petitioner Is Not Barred from Having This Question Considered Although the Judgment of the Supreme Court of North Carolina in the First Action Before It Was Not Appealed to the Supreme Court of the United States.

We mention this point because the Supreme Court of North Carolina, in its last opinion, the one now under review, held:

"True, in the opinion, the Court, referring to the language of the Transportation Act more directly applicable, sec. 2069, said: 'It might suffice to say in answer to this position that plaintiff thus far has not undertaken to levy any process or execution against the property of defendant road, and his proceeding does not therefore come within the literal terms of the provision on which he here relies.' But the Court, putting aside this view, deals directly with the defenses presented, holding that they were not available to plaintiff, and that the former judgment in favor of the administrator established an enforcible liability.

"From the force and effect of these two judgments, unchallenged and unquestioned by writ of error or other process looking to their modification, we are of opinion as stated that plaintiff is concluded on the question of liability and that its

application for an injunction against final process has been properly refused. So far from appellee's endeavoring to evade the effect of the Federal regulations on this subject as suggested in appellant's brief, it would seem that appellant, having lost his right to review the judgments had against it, is endeavoring to obtain a rehearing of the case by means of a second suit, a course that is uniformly condemned under our decisions applicable."

As has been shown in the petition for certiorari, the above set forth view of the Supreme Court of North Carolina in the first appeal was in response to the contention of Respondent in its brief to the effect that the question of whether he would hereafter levy execution or attempt to collect the judgment was not then presented. Petitioner's view was and is that the law under which it seeks protection is against the levying of execution, and that if it had asked of this Court a writ prior to the actual levying of execution this Court would have properly said that it was not shown that execution had been or would be levied and the presumption was that none would be levied in the face of such a plain inhibition in the law and, therefore, the application at that time was premature. Our view on the point was made certain by the language of the North Carolina Court above set forth. It was claimed by Respondent that the first decision of the Supreme Court of North Carolina is *res adjudicata* of the Federal question and that this appeal is too late. That is a mistaken view of the law. It may be *res adjudicata* or the law of the case so far as the lower State

Court is concerned, but that is not true as to this Court on the Federal question.

This Court, in the case of *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, had before it the judgment of a State Court in certain condemnation proceedings. The defendants in error moved to dismiss the writ of error on the ground that the judgment of the State Court was not final. Plaintiff in error responded by saying that under the State practice, judgment of the Superior Court was final. This Court held that the judgment was not a final judgment and accordingly dismissed the writ, holding:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court, 82 Washington, 503, as laying down the law of the case, this court will not be thus bound."

In the case of *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, there was involved the constitutionality of a statute of Florida. The Fertilizer Works recovered a judgment in the Circuit Court of Florida for $3,000.00 against a fruit company, a corporation, and sued out a writ of execution against the lands of the company and placed it in the hands of the Sheriff, who returned that he was unable to find any property. Thereupon, under the Florida Code, the Fertilizer Works sued out an execution against the goods of Coe as a stockholder of the fruit company. The levy was made and

Coe filed a petition to quash the execution as illegal, claiming that it was without notice to him and amounted to a taking of his property without due process of law. The Circuit Court quashed the execution, the Fertilizer Works removed the case to the Supreme Court of Florida, and that Court reversed the judgment and held that the statute required no preliminary step to be taken before an execution, and the case went back to the Circuit Court for further proceedings in accordance with the judgment. It was again brought for hearing before the Circuit Court. Judgment was rendered denying the motion of Coe to quash and Coe sued out a writ of error to the State Supreme Court and the Supreme Court affirmed that judgment and then, on that second judgment, the writ of error was sued out to the Supreme Court of the United States. The Fertilizer Works moved to dismiss in the Supreme Court of the United States on the ground that the opinion delivered by the State Supreme Court in the first case decided the question involved and became the law of the case, and that since plaintiff in error had failed to take a writ of error, he was concluded. This Court said:

> "But as appears from what has been stated, the first decision did not conclude the litigation; it called for further proceedings in the Circuit Court, and not until the judgment rendered by that court on the going down of the mandate had been affirmed upon the second writ of error did there exist a final judgment in the court of last resort of the state, such as might be brought under the review of this court by virtue of sec. 237, Jd. Code, act of March 3, 1911, sec. 237, c. 231,

36 Stat. 1087, 1156. Besides, the contention that, by the local practice, the Federal question was not open for discussion or consideration upon the second writ of error is conclusively disposed of by the fact that the Supreme Court did, on that occasion, again consider it, with the result that the state law and the authority exercised under it were upheld as valid and not repugnant to the Constitution of the United States, and the immunity especially set up and claimed by plaintiff in error under that Constitution was overruled. *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248, 257, and cases cited."

See also *United States* v. *D. & R. G. R. R. Co.*, 191 U. S. 84, at page 93.

The North Carolina Supreme Court not only again passed upon the Federal question in this second case, but that is the first time it could have passed on it effectually, there not having theretofore been an execution levied. Petitioner is asking relief against this second judgment, allowing the execution and passing on and denying the Federal right claimed under Section 206(g) of the Transportation Act.

Does the Record Show That the Cause of Action on Account of Which the Judgment Was Obtained Grew Out of the Possession, Use, Control, or Operation of a Railroad or System of Transportation by The President under Federal Control?

Yes. To hold otherwise would be to permit the device of suing on a judgment to defeat the Federal right. Certainly this Court will not permit a legal contrivance of that kind to circumvent the purpose of

Congress. Aside from form, it is true that the underlying cause of action in the second case was the tort of the Government employes. North Carolina, following the majority rule, holds:

> "Where a judgment creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second."
>
> (Syllabus) *Springs* v. *Pharr*, 131 N. C. 191.

In the *Springs Case, supra,* the North Carolina Court said:

> "In the above case of *Lawton* v. *Perry*, 40 S. C., at pages 274, 275, it is said: 'Usually it happens that the *cause of action* is so completely absorbed in the judgment that it is not competent longer to consider such cause of action apart from the judgment. This is not universally the case, however. * * * So far as dignity or rank as between the judgments (that of 1867 and 1889), they were the equal, one of the other, for each was a judgment. There was, therefore, no new dignity created. Would it not be a hardship to declare this judgment obtained in 1889 to have destroyed that of 1867? It seems to us that it should fall among the exceptions to the general rule, and not affecting the general rule.'
>
> "We must concur in this conclusion that a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a *cause of action* is merged in the judgment."

The bill, a part of the record in this case, discloses that the complaint in the first action brought by King, Administrator, set forth:

> "* * * At all the times herein mentioned said lessee was in possession of said railroad under

said lease, operating the same under the Director General of Railroads of the United States, pursuant to the Act of Congress in such case made and provided."

It also set up the answer of the Railroad Company in the first case which clearly showed the possession and operation of the road at the time of the collision by the President under Federal control.

The answer of respondent to the bill in this case, as has been shown, referred to and made a part thereof the pleadings, trial, judgment, and subsequent proceedings as they appear in the record of the first cause. The answer also refers to and makes a part thereof the record of the proceedings in the second cause. The answer does not deny the averments of the bill which plainly state that the judgment recovered was on a cause of action which arose out of the possession, use, control, and operation of the railroad of the defendant by the President under Federal control. The opinion of the Supreme Court of North Carolina in this case re-states the above facts at page 2. That Court in its last opinion further said:

"In the original action against the plaintiff, the fact that the road had been taken over by the government under the acts of Congress and executive orders appertaining to the subject was directly presented and the question of liability was decided against plaintiffs. This was under the position then prevailing here and in some of the other state courts under these acts of Congress and executive orders, by correct interpretation the companies, in this instance plaintiff's lessee, were in charge of, and operating the roads under the supervision and control of the Director General,

and in proper instances both could be held liable. True, the position was later disapproved by the Supreme Court of the United States, the final authority on these questions, in *Miss. Pacific R. R.* v. *Ault*, 256 U. S. p. 554, and other cases, but this only serves to show that the judgment in question was erroneous, and binds the parties unless and until it is reversed or modified by appeal or other writ in the orderly review of the case."

The Court, in its last opinion, also said:

"Recurring again to the facts presented in the first action by the administrator, plaintiff having plead the acts of Congress and executive orders taking over the roads by the government in bar of relief, the defenses were disallowed and verdict and judgment were had establishing liability notwithstanding these alleged defenses. This judgment it will be noted having been entered more than twelve months after the Transportation Act went into effect."

The Supreme Court of North Carolina has not sought to base its judgment on the ground that it was not established that the cause of action on which the judgment was obtained grew out of Federal operation. It has apparently, and we think properly, conceded that the record clearly establishes such fact.

The Cause of Action on Which the Judgment Is Based Grew Out of Federal Control and Execution Cannot Be Levied Upon the Property of Respondent Because of the Inhibition in Section 206(g) *of the Transportation Act.*

We are not sure that we grasp the discussion and

reasoning of the Supreme Court of North Carolina in its two decisions. It is advisable to look to the first decision because the second quotes therefrom and is based thereon.

The Court first held, and cited decisions in support thereof, that the judgment rendered by a court of general jurisdiction may not be attacked collaterally except for lack of jurisdiction of the cause or the parties apparent on the face of the record. The general exception thereto is for fraud.

This Court, in referring generally to when a suit in equity would lie to enjoin a judgment, said:

> "Difficulty would attend any attempt to prescribe a rule which will apply in all cases; but it is safe to affirm that equity may exercise jurisdiction in such a case, where the evidence clearly shows that it would be against conscience to execute the judgment, because the injured party had a just defence of which he could not avail himself in the suit at law, or of which he might have availed himself at law, but was prevented from so doing by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents. *Insurance Company* v. *Hodgson*, 7 Cranch, 336.
>
> "On the other hand, said Marshall, C. J., it may with equal safety be laid down as a general rule that a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the court that the defence in the suit at law ought to have been sustained. *Walker* v. *Robbins*, 14 How. 585; *Creak* v. *Sims*, 5 id. 204; *Sample* v. *Barnes*, 14 id. 73.

* * * * * *

"Relief in equity may be granted in case of fraud or collusion; but it will not be granted in other cases, unless it clearly appears that to allow the judgment to be executed would be contrary to equity and good conscience, and that the facts which render it inequitable were unavailable as a defence in the action in which the judgment was recovered, without any fault or negligence of the losing party. *Clute* v. *Potter*, 37 Barb. 199; *Burton* v. *Wiley*, 26 Vt. 432; *Carrington* v. *Holabird*, 17 Conn. 537; *Kerr on Inj.* 22; *Simpson* v. *Hart*, 1 Johns, Ch. 98."

Crim v. *Handley*, 94 U. S. 652, at 658.

It is also true that there are decisions which hold:

"In addition to mistake, there are other causes which, though not due to any fraud or mistake of the prevailing party, are, nevertheless, sufficient to warrant the interposition of equity to prevent the enforcement of an unjust judgment or decree. These other causes include sickness, accident, surprise, and all other causes by reason of which, and without any fault on his part, other than error on the part of the court, the losing party is unable to present his cause of action or of defense; *Kersey* v. *Rash*, 3 Del. Ch. 321; *Rice* v. *Railroad Bank*, 7 Humph. 39; *White* v. *Washington*, 5 Gratt. 645. Among these causes for relief the following may be enumerated: Illness of the party or his counsel, or other accident preventing either from attending the trial or doing some other act essential to the defense of the action: *Pharr* v. *Reynolds*, 3 Ala. 521; *Clifton* v. *Livor*, 24 Ga. 91; *Brooks* v. *Whitson*, 7 Smedes & M. 513.

Little Rock, etc., Ry. Co., v. *Wells*,
61 Ark. 354, 54 Am. St. Rep. 242.

While this record shows that illness of Petitioner's counsel caused the five day delay and prevented appeal of the first case, we do not take the time of the Court to discuss further that question because Petitioner does not rely for relief on that principle. We are not seeking to correct the error of the lower State Court. Our case assumes that there is a judgment. If that judgment was being attacked on general grounds, that would be a different case. What we assert is that Congress has said that an execution on this judgment cannot be levied upon the property of this railroad.

The pertinent part of the North Carolina Supreme Court's opinion is:

> "We are of opinion that this second inhibition (Section 206(g)) applies, and was intended to apply to the judgments provided for by the Act itself, or, at most, to these and other judgments for such causes of action which had been permitted and obtained against the Director General under other and cognate Federal legislation."

How can it be said that this inhibition "was intended to apply to the judgments provided for by the Act itself?" There is no such limitation in the language. If that view is correct, then the Act of Congress should have read:

> "The Government has had sole control and operation of the railroads and we have authorized suit against the Government. Where such suits have been brought and judgment obtained against the Government, there shall be no levy on the railroad property."

That would have been a vain enactment for the reason that without such enactment there could be no levy on corporate property for a judgment against the Director General. On the other hand, Congress evidently and plainly had in mind to prevent the levy of an execution which but for the action of Congress could be levied on carrier property and, therefore, must have had in mind a judgment such as this against the railway corporation. We think it is manifest that Congress did not name the defendant and did not intend to limit the inhibition to suits it had authorized but went directly to the heart of the matter, regardless of who was defendant and regardless of whether the suit was authorized or unauthorized, and regardless of whether correctly decided or erroneously decided, and provided that where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad by the Government, no execution shall be levied upon the property of any carrier.

It seems clear that Congress had knowledge that certain State Courts, including North Carolina, had erroneously, as in this case, permitted judgments to be rendered against the railway companies for torts committed by the agents of the Director General, and that such judgments would be enforced against the property of the carrier unless Congress enacted some law to prevent and hence it enacted Section 206(g).

The Supreme Court of North Carolina held in its original opinion, and repeated the language in its last decision, as follows:

"The first inhibition, as stated, being to protect

the roads from physical interference by third persons, creditors, or others, while in possession and control of the Government, and the second to protect the carriers in the possession and control of their own roads from physical interference by reason of any actions or judgments provided for and allowed by the Government, but this legislation, in our view, was never intended to protect the carriers from judgments in independent suits by claimants where they have failed to plead or properly insist on the immunity from liability which had been provided for their protection. The Government has made provision by its legislation to protect the carriers from molestation by reason of any judgments it has authorized and provided for, but it has not undertaken, as guardian *ad litem*, to avoid or destroy the force and effect of independent judgments against which the carrier has neglected or failed to interpose his proper defenses."

Congress doubtless intended, as a war measure, to provide, and did provide in Section 10 of the Federal Control Act, for the uninterrupted possession by the Government of the railways' property during Federal control. It further intended, as a measure to correct the aftermath of war, still dependent upon war powers, to protect the possession by the carrier of its property after the end of Federal control from physical interference based on wrongs committed by the Government agencies during Federal control, and effectuated this purpose by Section 206(g) of the Transportation Act, 1920.

The non-sequitur of the Supreme Court of North Carolina is, we respectfully submit, in saying that the

desired object is to be obtained by confining the inhibition of Section 206(g) to judgments which the Government had authorized. The object desired is uninterrupted possession by the railways against seizure on account of a cause of action arising out of Federal control. It matters not whether the seizure is on a judgment authorized by the Act of Congress or not, so long as the judgment was based on a Federal wrong.

Section 206(g) which we are dealing with is founded on justice and is to prevent an execution being levied on the railroads for the default of the Government. It presupposes such a judgment as ordinarily would give the holder thereof the right to levy on corporate property, to wit, the railroad. Knowing that such a judgment was wrong in law, in equity, and in morals, Congress precluded the perpetuation of such injustice by Section 206(g).

Respondent is not being deprived of any constitutional right. As Mr. Justice Brandeis clearly intimates in the *Ault Case,* it would have been unconstitutional for Congress to have enacted that the railway companies shuold be liable for acts of the Railroad Administration. Congress, therefore, made no such attempt in the Federal Control Act, and when it came to pass the Transportation Act, realizing that a contrary and illegal purpose had, by interpretation of certain Courts, including North Carolina, been put on the Federal Control Act, Congress enacted Section 206(g) to prevent the seizure of carrier property for acts of the Railroad Administration.

Petitioner is not seeking to go behind the first judg-

ment and have the error corrected, but is seeking to avail of the Act of Congress, which was, we believe, enacted to meet just such a case as is before this Court.

The basic facts are: That Petitioner did not have possession of its railroad when the accident occurred; it had not voluntarily surrendered possession; possession had been taken from its lessee by Act of Congress; the wrong, if any, was not done by Petitioner's agents. The levy upon and sale of Petitioner's property on account of a wrong done by the Government is not just. The foundation of this whole matter is a judgment against one person for the wrong of another which is legally and morally indefensible. Congress has said that such execution shall not be levied, and we respectfully submit that this writ should be allowed in order that Petitioner may receive the benefit of the Federal Law which has been set up in this case.

Respectfully submitted,

S. R. PRINCE,
H. O'B. COOPER,
W. M. HENDREN,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

FILED
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WM. R. STANS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 322

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
RESPONDENTS.

BRIEF OF PETITIONER IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI.

S. R. PRINCE,
H. O'B. COOPER,
W. M. HENDREN,
Counsel for Petitioner.

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RESPONDENTS.

No. 322

BRIEF OF PETITIONER IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI.

The motion made by Respondents is based on the claim that the judgment of the Supreme Court of North Carolina sought to be reviewed is not a final judgment. Petitioner states that the record in this case shows that the judgment of the Supreme Court of North Carolina was a final judgment in form and in substance. As set forth in the record, a judgment had been rendered against Petitioner on a cause of action which arose out of the operation of the railroad during Federal control and when the railroad was in the possession

of and being operated by the Government. No execution was issued on this first judgment and a second suit was filed by King, Administrator, against the North Carolina Railroad Company based on the first judgment. There was a judgment in favor of Plaintiff against Petitioner in this second suit. Petitioner appealed to the Supreme Court of North Carolina, which Court affirmed the lower court, and the judgment of affirmance by the Supreme Court was certified to the Superior Court of Guilford County and judgment was there entered in accordance with the certificate of the Supreme Court. The Administrator obtained an execution from the Clerk and delivered it to Story, Sheriff, who, in accordance with the mandate of said execution, levied upon property of the Railroad Company.

This was the situation when Petitioner filed its bill alleging that the execution was illegal and had been issued in contravention of Section 206g of the Act of Congress known as the Transportation Act, which provides:

> "No execution . . . shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

The prayer of that bill was for an injunction against the Sheriff's selling the property which he

had theretofore levied upon. Petitioner secured a restraining order (record, p. 15) on the verified bill, and that order directed the Defendants to show cause why an injunction should not be issued restraining them from taking any further steps to satisfy the execution of the judgment and enjoining the Sheriff from selling the property of Plaintiff which he had levied upon. Thereafter the Defendants answered, setting up, among other things, that Section 206g had no application to this controversy and that all the matters alleged in the complaint as grounds for injunctive relief had been adjudicated and were *res adjudicata* (record, p. 13).

With the pleadings in this shape, the case came on to be heard on the motion of Plaintiff to continue and make permanent the temporary restraining order (16), and the Court below entered an order which states:

> "It is now ordered and adjudged that the motion of the Plaintiff to continue and *make permanent* and (the) temporary restraining order issued by Honorable W. F. Harding be and it is hereby denied" (16).

That Court, in the exercise of its discretion, continued the restraining order pending Plaintiff's appeal to the Supreme Court of the State in these words:

> "In the exercise of the discretion vested in the Court by Chapter 58 of the Public Laws

of North Carolina of 1921, and upon motion of the plaintiff, the order of Judge Harding heretofore entered in this case is continued in force and effect pending plaintiff's appeal from the refusal to make said order permanent and the action of the Supreme Court of North Carolina upon said appeal, upon condition that the plaintiff execute a good and sufficient bond in the sum of $3,500, conditioned as is provided by the aforesaid statute.

"The plaintiff is taxed with the costs of the case." (Record, p. 16.)

The record then shows the exception of your Petitioner in the following language:

"To so much of the foregoing order as denies the application of the plaintiff to continue the temporary restraining order *and make the same permanent*, the plaintiff excepts and appeals to the Supreme Court. Notice of appeal is waived and appeal bond is fixed at $100." (Record, p. 16.) (Italics, the writer's.)

The error assigned in the Supreme Court of the State by Petitioner was as follows:

"The refusal of the Court to continue the temporary restraining order, and make the same permanent." (Record, p. 17).

It is upon the foregoing record that we maintain that this was a final judgment. It is our understanding of the law that if the decree which

this Court is called upon to pass on decides finally the right of the parties, that is, if nothing further remains to be done, then the judgment is final.

Petitioner's property had been levied upon and unless restrained it would be sold and, therefore, in the nature of things, the injunction asked in this case was not merely ancillary but was the principal and the only relief demanded. It was the relief itself.

It will be noted that in the judgment of the Superior Court the Plaintiff is taxed with the costs of the case. This is never done unless the judgment is final.

There remains nothing to be done in this case and the statements in the brief of Respondents that the case is still pending and the issues have never been tried are mere words.

The statement is made in the brief (p. 3) that the motion made was "for a temporary or preliminary injunction to restrain action by Respondents under said execution *until the case could be heard upon the merits* and finally determined." This is an error. As will have been seen, the motion made was to make permanent the restraining order theretofore secured.

Petitioner could have asked that the restraining order be continued until the hearing, but it realized that the whole case was made by the bill and answer and that there was in issue but one single point of law arising under the Transportation Act and, therefore, it did not ask for a continuance of the restraining order until the hear-

ing, but it asked that the restraining order be made permanent and this is what was denied, and the judgment of the Court below which was affirmed was a denial of a permanent injunction.

In the report of the case, the reporter, in stating what was before the Court, said:

> "From so much of the judgment as refuses to continue the restraining order to the hearing and also to make the same permanent, Plaintiff excepts and appeals."

That is inaccurate because, as heretofore shown, the record, pages 16 and 17, shows that Petitioner excepted to the refusal of the Court "to continue the temporary restraining order and make the same permanent." This same language was used in the assignment of error, and at no time did Petitioner ask for a continuance of the restraining order to the hearing. There was nothing to be heard except the issue of law which had been determined by the lower court and which determination was affirmed by the Supreme Court.

The cases cited by the Respondents are easily and clearly distinguishable from the case in hand. In those cases there remained something to be done or there was merely a demurrer sustained with the right to amend remaining. In this case there remained nothing to be done and if the Petitioner does not secure relief its property will be sold contrary, as we believe, to the Federal statute.

We are aware that this Court has held that it

will not review by piecemeal the action of a State Court. We are not asking that.

We are also aware that in certain cases this Court has ruled that on the question of finality the form of the judgment is controlling. If that be the rule, then we assert that the form here is a final judgment.

The Court is referred to the case of *Carondelet Canal Company* vs. *Louisiana*, 233 U. S. 362. That was a suit by the State of Louisiana in a Louisiana Court against the Canal Company for the recovery of a canal and certain appurtenant properties. The suit was dismissed by the Civil District Court. On appeal the Supreme Court of the State reversed the judgment dismissing the suit and ordered that a judgment be entered against the Canal Company, but reserved for further adjudication in the proceedings the claims of the State to a certain strip of ground, and ordered an accounting. The case was thereupon brought to this Court and in this Court a motion to dismiss on the ground that the judgment was not final was made. This Court said:

> "The judgment disposes of and orders the delivery of practically all of the property sued for: (1) the waterway in its entirety; (2) all the property and improvements appurtenant to it, including the roadway or roadways upon the sides of it. It reserves property not appurtenant and an accounting of certain disbursements. The reservation concerns only a small

piece of ground upon which there was a dispute as to whether it was appurtenant to the canal, a question the court apparently could not determine as it was a question of fact. All else will be taken from the canal company and delivered to the State. That is, all was decreed that it was the purpose of the suit to have decreed and which not only constituted its success, but which involved and disposed of the Federal right asserted by the canal company. The judgment, therefore, has a substantial finality. Is it not as well in form?"

The Court further referred to certain cases, some of which have been cited by Petitioner in this case, and differentiated them in the following language:

"In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the 'questions reserved.' And, it is to be assumed, this was purposely done to give finality to the questions not reserved, so that the decree could be immediately executed upon the property involved requiring it to be delivered into the possession and administration of the State. This disposition we can easily conceive, the Court considered necessary to the rights which the State was adjudged to have and the remedy commensurate with them. The decree, therefore, had a definiteness which did not exist in the cited cases, the Federal rights asserted by the canal company were injuriously disposed of. The ground of dismissal of the writ of error based on the judgment is not, therefore, sustained."

The case at bar has an explicit finality and the Federal right asserted in the lower court and ruled against this Petitioner in the lower court was finally decided adverse to this Petitioner, which decision was affirmed by the Supreme Court of the State. That the affirmance closed the chapter so far as the State Court was concerned on the Federal right here asserted, the opinion of the Supreme Court is, we think, conclusive. It said:

> "As we understand there is no substantial difference between the parties as to the facts affecting their rights, and from these facts contained in the present record, and by proper reference in the case of *King, Admr.* vs. *R. R.*, reported in 184 N. C., p. 442, it appears . . " (p. 1, opinion of Supreme Court of North Carolina).

This shows that there was no dispute of fact and that the only question in issue was one of law arising on the pleadings.

The Supreme Court, after referring to the preceding cases between the same parties growing out of the same cause of action, said:

> "Upon these the facts chiefly pertinent, we must approve His Honor's ruling in denial of the injunction, and are of opinion that the plaintiff is concluded by the judgments against it as to the protection and immunity it now

endeavors to invoke." (P. 4, Supreme Court of North Carolina's opinion)

The Court further said:

> "From the force and effect of these two judgments, unchallenged and unquestioned by writ of error or other process looking to their modification, we are of opinion as stated that plaintiff is concluded on the question of liability and that its application for an injunction against final process has been properly refused." (P. 6, opinion of Supreme Court of North Carolina)

No language could make it plainer that there remains nothing further to be done and that this judgment from which this writ is sued out is final not only in form but in substance.

This Court held as late as *Bruce* vs. *Tobin*, 245 U. S., 18, "that the finality contemplated was to be determined by the facts of the record and the formal character of the judgment rendered . . " This means, as we view it, that since this judgment did not say that the case was dismissed, which would have been a work of supererogation, particularly as it taxes the costs against the Plaintiff, which can be done only by a final judgment, this Court can look to the judgment *and* the record in determining whether or not it is in truth and in form a final judgment. If this Court will examine the record we feel confident it will reach the

conclusion that the judgment is final in this case in form and in substance.

Respectfully submitted,

S. R. PRINCE,
H. O'B. COOPER,
W. M. HENDREN,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

October, 1924.

FILED
MAR 13 1924
WM. R. STANSBURY
CLERK

No. 322.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
Respondents.

BRIEF OF RESPONDENTS.

W. P. BYNUM,
R. C. STRUDWICK,
Counsel for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923

PETITION FOR WRIT OF CERTIORARI.

North Carolina Railroad Company, Petitioner,

vs.

C. D. Story, Sheriff of Alamance County, and P. M. King, Administrator, Respondents.

BRIEF OF RESPONDENTS.

STATEMENT OF FACTS.

The original action of P. M. King, administrator of Maggie Barber, against the North Carolina Railroad, was begun March 9, 1920, and judgment in his favor was rendered in the Superior Court of Guilford County, North Carolina, on March 21, 1921. The action was for a tort, the negligent killing of his intestate, Maggie Barber, on February 28, 1920.

In its answer to the complaint therein defendant denied the alleged negligence, and it further alleged that it was, at the time of the occurrence, being operated by the Director General of Railroads under Federal authority. It claimed immunity to suit in that action under the Federal Control Act and the administrative orders issued pursuant thereto. It did not set up the provisions of the Transportation Act, nor claim immunity thereunder, though that act was in full force and effect, having been passed February 28, 1920, nor did it plead any provision of the Constitution of the United States.

Upon the trial at March Term, 1921, the jury rendered a verdict in favor of plaintiff for $2,500, and a judgment was rendered accordingly. No appeal to the Supreme Court was ever perfected from this judgment.

On February 8, 1922, it stood unpaid, unreversed, in full force and effect.

On that day King, the administrator, brought an action upon the judgment. He alleged only that the judgment had been rendered; that it was in full force and effect, and was unpaid. In its answer to this second action, petitioner did not deny the rendition of the judgment, and that it was unpaid, but alleged that the judgment rendered against it at March Term, 1921 (the judgment upon which the action was brought), was not "legal or binding"; it also pleaded the same immunity under the Federal Control Act which it had pleaded in the first action, and for the first time set up the provisions of the Transportation Act as a bar to the action.

The Superior Court sustained a demurrer to this action and gave judgment for plaintiff. From this judgment petitioner appealed to the Supreme Court of North Carolina, which, on November 29, 1922, affirmed the judgment of the Superior Court (184 N. C., 442). It decided that the first judgment, though it might have been erroneous, not having been appealed from, was in full force and effect, and concluded the defendant as to all such matters as were set up in defense therein and decided against it in that action; that being a valid judgment, in full force and effect and unpaid, King, the administrator, had a right to bring an action upon it, and that the judgment in said second action was a valid one. It further held, as to the Transportation Act set up by the defendant for the first time in its answer in the second action, that its provisions did not apply to prevent plaintiff from levying an execution upon this second judgment.

When this judgment was certified to the Superior Court, it, on March 30, 1923, entered judgment directing "that execution

of said judgment do proceed." There was no attempt by petitioner to have either of these two judgments reviewed by this Court.

Thereafter execution was issued upon said judgment, and was levied by respondent Story, sheriff of Alamance County, upon certain property of petitioner. On May 5, 1923, the present action was begun to enjoin King, the administrator, and Story, sheriff, from proceeding under said execution to sell petitioner's property to satisfy the same. It is called a bill in equity, and the relief sought is permanently to enjoin the plaintiff in the execution, P. M. King, administrator, from enforcing it by due process of law. The judge of the Superior Court, before whom the restraining order was made returnable, made an order dissolving the same, and upon appeal by petitioner to the Supreme Court, that order was, on February 21, 1924, affirmed.

Petitioner's application is for a writ of *certiorari* to review said last decision on the ground that it has deprived petitioner of a right, privilege or immunity guaranteed to it under section 206 (9) of the Transportation Act of February 28, 1920.

ARGUMENT.

(1) Petitioner says that it is not barred from having this question now considered, although it made no move to have the decision and judgment of the Supreme Court of North Carolina (rendered November 29, 1922) reviewed by this Court. The record shows that such decision and judgment were rendered in an action wherein the petitioner set up in its answer the provisions of the Transportation Act as a bar to respondent's right to maintain the action or to issue or to levy execution upon the judgment obtained therein. The Court (184 N. C., 442) finally decided both these questions against it, and petitioner in its present petition (page 14) admits this, saying, "The Supreme Court of North Carolina in its opinion, found in 184 N. C., 442, erred and deprived petitioner of its rights, privileges and immunities set up and found in section 206 (9) of the act of

Congress known as the Transportation Act, in holding that said section of the said act of Congress was not intended to apply to judgments such as the one obtained against your petitioner." If so, why, then, did it not apply to have it reviewed here?

Having failed to apply for a writ of *certiorari* to review this judgment within the time limited by law, petitioner cannot avoid the effect of its failure by an independent suit in the nature of a bill of equity, to restrain the execution of said judgment, which bill was filed after the three months had expired. This is an attempt to do indirectly what the statute forbids to be done directly, and one which this Court has declared must fail. *Rooker v. Fidelity Trust Co.*, decided December 10, 1923.

It is contended by petitioner that the Transportation Act refers to the *levying* of an execution, and not to the issuing of it. This would seem to be an untenable position. If a court decides that an execution on a judgment may rightfully be issued, it thereby necessarily decides that it may rightfully be levied. Besides, the Supreme Court of North Carolina did expressly decide that the execution might be both issued and levied, when it held that the Transportation Act did not apply to the judgment in question, or in any manner protect the petitioner from execution on the judgment. The effect of the affirmance of the judgment, to the obtaining of which petitioner set up the Transportation Act as a bar, was to declare that it might be enforced by the ordinary process of law, even if no express reference had been made to the Transportation Act. *Gordon v. U. S.*, 117 U. S., 702. This was a final judgment upon the same Federal question now attempted to be presented, and petitioner's right to move to have it reviewed accrued then (November 29, 1922). *North Carolina R. R. v. Zackery*, 232 U. S., 248. Cases are cited in petitioner's brief to the effect that certain judgments therein referred to were not final in the sense that they might be reviewed by writ of error or *certiorari*. But it would seem not to admit of a doubt that this judgment was a final one, to all intents and purposes. It finally adjudicated all the questions

presented, including the force and effect of the Transportation Act, upon the merits; affirmed the right of plaintiff therein to recover a definite sum of money from petitioner, and not only so, but it expressly decided that this judgment might be enforced by execution notwithstanding the provisions of the Transportation Act. There was nothing further to be done by that Court, nothing left undecided which might call for further action on its part.

This was a final judgment as defined by this Court. *Mower v. Fletcher*, 114 U. S., 128. It further appears from the record that when this judgment was certified down to the Supreme Court of Guilford County, that Court, on March 30, 1923, entered judgment thereon, expressly directing that "execution thereof do proceed." There was no appeal from this judgment by petitioner, nor does it refer to it in its brief, although the Supreme Court, in the opinion in this case, refers to it as one of the judgments by which the petitioner is concluded.

It is difficult to see why it is not bound by it, in the same manner, as it would be bound by any other judgment by a court of competent jurisdiction, made in an action to which it was a party. It thus appears that here are two judgments of the courts of North Carolina, one rendered November 29, 1922, and the other rendered March 30, 1923, expressly denying to petitioner the immunity it again attempts to claim. Petitioner took no steps to have either of them reviewed, and by its own delay and laches, it has let the time elapse within which it is allowed by the statute to have them reviewed here.

Petitioner contends, however, that a *certiorari* ought to be granted him to review the decision of the Supreme Court of North Carolina rendered in the present action on February 21, 1924.

Respondent submits that this application should not be allowed:

(1) Because it decides no Federal question, nor was the decision of any Federal question necessary to the conclusion an-

nounced therein. The petitioner in its petition (page 15) incorrectly states that it was held and decided therein "that the inhibition against the levying of an execution on the judgment was not intended to protect the carrier from judgments in independent suits in which the carrier had failed to interpose its proper defenses, and therefore the judgment denying the injunction was affirmed." A reading of the opinion will show that the language here referred to was quoted by the Court from its former decision as one of the reasons why petitioner was concluded thereby. This being so, the assertion in petitioner's brief would seem to be unsupported by the record, inaccurate, and misleading. That Court did decide, and we submit it decided nothing else, that petitioner was concluded by the two judgments referred to in the opinion, which it had made no attempt to appeal from or to have reviewed in any manner. It says "it would seem that appellant (petitioner) having lost its right to review the judgments against it, is endeavoring to obtain a rehearing of the case by means of a second suit, a couse condemned under our decisions applicable. *Hospital v. R. R.*, 157 N. C., 460, and cases cited." Petitioner says in its petition (page 15): "The Supreme Court of North Carolina, in its opinion rendered February 21, 1924, deprived your petitioner of the right, privilege and immunity set up and claimed by it, and found in section 206 (g), Transportation Act, 1920, in holding that your petitioner was concluded on the question of liability by the two judgments, which were unchallenged, and that its application for an injunction against execution had been properly refused." The holding by that Court that petitioner was barred from obtaining therein the relief it sought, because it was barred or concluded by the two former judgments, unappealed from, presents no Federal question. In *San Francisco v. Itsell,* 133 U. S., 65, it is said: "This Court has no jurisdiction to review a judgment of the highest court of a State, unless a Federal question has been, either in express terms or by necessary effect, decided by that Court against the plaintiff in error. Rev. Stat., sec. 709 (cases cited).

"In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that Court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, and question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in nowise depending upon the Constitution, treaties, or statutes of the United States. *Chouteau v. Gibson,* 111 U. S., 200."

King v. West Virginia, 216 U. S., 101.
Delmas Case, 210 U. S., 335.

The record shows that the facts alleged in the complaint in this action are the same as those set out in the answer of petitioner to the action brought by the administrator upon the first judgment (184 N. C., 442); that it set up and relied upon that same section of the Transportation Act, thereby inviting and obtaining an adjudication of the question as to its immunity from execution under said act, which it now attempts to claim. The parties are the same (the joinder of the sheriff is mere surplusage, as was admitted by petitioner in its brief filed in the Supreme Court of North Carolina). If the question were an open one here, it would seem that the decision of the State Court that, upon the record, it was concluded in this action by the two former judgments and decision was right; but as has been stated, this Court has repeatedly held this is not a Federal question. If by successive suits a party claiming to be aggrieved could constantly renew its right to have final judgments of state courts reviewed here, then the statutory provision that such right must be exercised within three months after the decision complained of would be rendered nugatory.

In so far as the principle announced in *People v. Atwell,* 261 U. S., 590, has any application, it would seem that it furnishes another ground for denying a writ of *certiorari* in this case.

The decision of the Supreme Court to the effect that petitioner was concluded by the two former judgments of the State Courts was a decision upon an independent ground not involving a Federal question, and was broad enough to sustain the decision complained of. If such a case, it is declared in *Atwell's case,* this Court will not disturb the decision of the State Court.

(1) and (2). Petitioner, in its brief, contends secondly and thirdly that the cause of action, on account of which this judgment was obtained in the second action, grew out of the possession, use and control and operation of the railroad by the President, under Federal control.

Petitioner is here referring to the action brought upon the first judgment (184 N. C., 442). As to the first judgment, that of March, 1921, it says in its brief (page 33): "Petitioner is not seeking to go behind the first judgment and have the error corrected." It thereby admits its validity. The record shows that the judgment complained of (184 N. C., 442) was rendered by the Supreme Court of North Carolina, November 29, 1922, and that no application to review it has ever been made until the present action was instituted on May 5, 1923. This being the case, the judgment has by lapse of time become final so far as a review by this Court is concerned, and it would not seem to be material to inquire out of what the cause of action upon which it was based arose. But in order that petitioner's position on this point may not pass unchallenged (for we submit it is not the law), respondents say that the cause of action there was the nonpayment of the original judgment, and was not at all the cause of action upon which that original judgment was founded. The original judgment was *ex delicto,* for a tort, the action upon it was *ex contractu,* upon the promise, conclusively implied by law, on the part of every judgment debtor, that he will pay and satisfy the demand which the law has declared that he owes. This is a new cause of action, distinct and separate from the original one. 3 Bl. Comm., 160. It has been

held that an action upon a judgment for slander was an action *ex contractu,* the original cause of action being merged in the judgment. So (except for purposes of a lien) it has been held in North Carolina. *Moors v. Newell,* 94 N. C., 270; *McDonald v. Dixon,* 87 N. C., 407. Other well-considered cases are to the same effect:

Carr v. Roscher, 119 N. Y., 535.
Johnson v. Butler, 2 Iowa, 535.
Dawson v. Harmons, 65 Minn., 402.
Mobile Bank v. Mobile R. R., 69 Ala., 305.
Andrews v. Varrell, 46 N. H., 17.
Byrd v. Creed, 65 Ohio, 46.

This Court, upon this point, has said: "If there be any one principle of law settled beyond all questions, it is this, that whensoever a cause of action, in the language of the law *transit in rem judicatam,* and the judgment thereon remains in full force unreversed, the original cause of action is merged and gone forever." *U. S. v. Loeffler,* 11 Peters, 86 (101).

The question presented upon this record is not, as petitioner insists, whether, under the provisions of the Transportation Act, an execution upon such a judgment as that passed upon in 184 N. C., 442, can be rightfully issued and levied upon petitioners property; not whether the decision of the Supreme Court of North Carolina that this could be done and denying to the petitioner the immunity from such execution it then claimed was erroneous, but whether or not, after petitioner by laches and delay, has permitted the time elapse within which it might have applied to have that decision reviewed, it can now, by an independent suit, obtain a review of that decision which it should have applied for within three months after its rendition.

The statement of petitioner in its brief (page 26) with regard to the answer of respondent, is not correct, as a reference to the record will show (Petition, p. 13). It is said in the brief

(page 28): "It is advisable to look to the first decision (that of November 29, 1922), because the second (February 21, 1924) therefrom is *based thereon.*" An examination of the two opinions will show the inaccuracy of the last statement. The last opinion does quote from the first, but only to show what it had decided in that first opinion, as a reason for holding, as it did, in the last opinion that petitioner was concluded by the former decision.

Something is said in the brief (page 28) of the equitable jurisdiction residing in courts to enjoin the execution of a judgment obtained by *fraud.* This is purely gratuitous. There is no allegation of fraud, or even mistake, made in any pleading in this record, nor is any reference to fraud made in any opinion or decision appearing therein.

It is respectfully submitted that the application for a writ of *certiorari* should be denied.

W. P. Bynum,
R. C. Strudwick,
Counsel for Respondents.

Mitchell Printing Company, Briefs and Records, Raleigh

FILED
SEP 25 1924
WM. R. STANSBU
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No. 322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
Respondents.

Motion to dismiss

BRIEF OF RESPONDENTS.

W. P. BYNUM,
R. C. STRUDWICK,
Counsel for Respondents.

POSTPONED TO MERITS
JAN 12 1925

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1924

MOTION AND NOTICE.

North Carolina Railroad Company, Petitioner,

vs.

C. D. Story, Sheriff of Alamance County, N. C., and P. M. King, Administrator, Respondents.

To S. R. Prince, H. O. B. Cooper, and W. M. Hendren, Attorneys of Record for Petitioners:

Please take notice that respondents will, on Monday the 20th day of October, 1924, present to the above named Court at its Court room in Washington, their motion to dismiss the writ of certiorari heretofore granted in this case. A copy of said motion and of the brief in support thereof is herewith delivered to you this.....day of September, 1924.

W. P. Bynum,
R. C. Strudwick,
Counsel for Respondents.

Received copy of the above notice, also copy of said motion and brief, September ....., 1924.

.....

.....

.....

Counsel for Petitioner.

MOTION TO DISMISS WRIT OF CERTIORARI

Now come the respondents and move the Court for an order dismissing the writ of certiorari herein:

First. Because the judgment of the Supreme Court of North Carolina thereby sought to be reviewed is not a final judgment.

This motion is based upon the transcript of the record accompanying the petition for certiorari and upon the records and files of this Court.

This ..... September, 1924.

W. P. Bynum,
R. C. Strudwick,
Counsel for Respondents.

BRIEF OF RESPONDENTS IN SUPPORT OF MOTION

The record shows that petitioner began this action on May 5, 1923, in the Superior Court of Guilford County, North Carolina. It alleged in its complaint certain facts, which it claimed, entitled it to a permanent injunction forbidding the respondents to sell certain of its property under an execution which had been issued to Story, Sheriff, upon a judgment obtained by King, administrator, against it. The prayer was for a permanent injunction. Respondents answered, denying certain allegations of the complaint, and, for a further defense, they pleaded that all matters set up in the complaint were *res adjudicata* and could not be again litigated in the present action.

On the 5th day of May, 1923 (the day the complaint was filed), petitioner obtained from a judge of said Superior Court (Harding) an order that respondents show cause, before Shaw, another judge of the Superior Court, at Winston-Salem, on May 22, 1923, why a temporary injunction should not be issued, and in the meantime, restraining respondents from taking any steps with a view to the sale of petitioner's property under said execution, until the further order of the Court.

The matter was heard before Judge Shaw at the time and place appointed. Whereupon he made an order adjudging

"that the motion of plaintiff (petitioner) to continue and make permanent the temporary restraining order issued by Hon. W. F. Harding be and it is hereby denied." Record, p. 16.

Petitioner appealed from this order to the Supreme Court.

That Court, on February 20, 1924, upon consideration of said appeal, affirmed the order of Judge Shaw. Petitioner thereupon applied for and obtained from this Court a writ of certiorari to review that judgment, or order. The judgment in the case of King, administrator, vs. the North Carolina R. R. Co. (184 N. C., 442) is referred to in the petition, but its relevancy does not appear. The writ of certiorari is not sought to review that judgment; indeed, it could not be, as it was rendered November 29, 1922, more than a year before application for the present writ was made.

The instant case is still pending in the Superior Court of Guilford County, the issues raised by the answer of respondents have never been tried or passed upon, and no final judgment has ever been rendered therein by that court.

This appears from an inspection of the record.

POINT I

THE JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA, SOUGHT TO BE REVIEWED BY CERTIORARI, IS NOT A FINAL JUDGMENT.

Petitioner's action was to obtain a final decree, permanently enjoining respondents from proceeding to enforce the execution.

It made a motion for a temporary or preliminary injunction to restrain action by respondents under said execution until the case could be heard upon the merits and finally determined. Until its motion could be considered it obtained, *ex parte,* a restraining order. Consolidated Statutes N. C., secs. 843, 847, 848, 850. Any order made by the judge in passing on such a motion, either granting or denying it, is in its nature interlocutory. It has no element of finality.

1 High on Injunctions (3d Ed.), secs. 3 and 4. A court of equity, in granting (or refusing) temporary relief, in no manner anticipates the final determination of the questions of right involved. High (*ut supra*), sec. 5.

The order appealed from being interlocutory, it cannot with reason be contended that the order or judgment of the Supreme Court, which affirmed it, was other than interlocutory. *Harriman v. Northern Securities Co.*, 197 U. S., 244, was a suit to obtain a permanent injunction, just as this is. The U. S. Circuit Court for the district of New York made an order granting to plaintiff a temporary or preliminary injunction forbidding it to make a ratable distribution of its corporate assets. The Circuit Court of Appeals, by its judgment, reversed this order of the Circuit Court, thereby dissolving the preliminary injunction. This judgment was the same, in legal effect, as the one now under consideration. Petitioner Harriman applied for and obtained from this Court a writ of certiorari to review this judgment.

This Court treated it as a matter beyond dispute, that the judgment of the Circuit Court of Appeals was not a final one. It retained jurisdiction and passed upon the merits of the case, however, because it was governed by the act of March, 3, 1891, under which finality of the judgment sought to be renewed was not necessary. *Forsyth v. Hammond*, 166 U. S., 506, 513; but it is otherwise under the act of September 6, 1916, which governs the instant case, where a certiorari is sought to review a judgment of the Supreme Court of a State.

The only effect of the judgment herein was to remand the case to the Superior Court for further proceedings.

An answer had been filed in the case; the issues raised hereby have never been passed upon and no final disposition of the case has ever been made by that Court. It was and is entirely competent for the Superior Court to allow the pleading to be amended, thus making a new and different case.

If it be said that any final judgment rendered by the Supreme

Court would necessarily be governed by the judgment and decision of the Supreme Court, this is no answer to respondent's motion.

In *Great West Tel. Co. v. Burnham,* 162 U. S., 341, 345, it is said that the final judgment of the trial Court of the State may have been the necessary result of the previous decision of the State Supreme Court of the questions presented for its determination, but it was none the less, on that account, a judgment of the trial Court. As such, it was, when rendered, open to review by the State Supreme Court upon a new appeal, and for that reason was not the final judgment of the highest Court of the State in which a decision of the cause could be had.

Upon another appeal from the final judgment which may hereafter be rendered by the trial Court in this case, the Supreme Court of North Carolina has the power to ignore, modify or reverse the present decision. It might do so. There is no statute of the State which forbids it.

Messenger v. Anderson, 225 U. S., 436, 444.

In this case it is said: "In the absence of statute, the phrase 'law of the case' as applied to the effect of previous orders on the latter action of the Court rendering them, merely expresses the practice of the Court generally, to refuse to reopen what has been decided, not to limit the power."

Many decisions of this Court sustain the position that the judgment now sought to be reviewed by the certiorari is not a final one. A few of them are cited.

In *Life Ins. Co. v. Adams,* 9 Pet., 573, it is said: "Though the merits of the case may have been substantially decided; while anything, though formal, remains to be done, the Supreme Court cannot pass upon the subject."

In *McCombs v. Knox County,* 91 U. S., 1, it is said: "The Supreme Court so far from putting an end to the litigation purposely left it open. The law of the case upon the pleadings as they stood was settled, but ample power was left in the Common Pleas to make a new case by amendment." "Where

something more than the mere ministerial execution of the decree is left to be done, the decree is interlocutory and not final, even though it settles the equities of the bill."

Dodge v. Twell, 135 U. S., 232, 235.

"The decree to be final must terminate the litigation upon the merits of the case; so, if there be an affirmance here, the Court below would have nothing to do but to execute the judgment or decree it had already rendered."

Bostwick v. Brinkerhoff, 106 U. S., 3.

The application of this test would seem to be conclusive in favor of this motion. The only decree or judgment which the Supreme Court of North Carolina has rendered in this case is one, which declares that petitioner was not entitled to a temporary or preliminary injunction. Upon an affirmance of that judgment here, no execution could issue; many things would be left to be done, before that stage was reached; the case would be still open for trial upon the issues raised by the pleadings as now filed, or as hereafter amended, and for the final judgment of the trial Court, after these matters had been disposed of.

POINT II

THE JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA NOT BEING FINAL, THE WRIT OF CERTIORARI ISSUED TO REVIEW IT SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The certiorari in this case is issued by virtue of the power conferred on this Court by the act of September 6, 1916. By the express terms of that act, this writ can issue to review only a final judgment of the highest Court of the State.

In *Bruce, Admr., v. Tobin*, 245 U. S., 7, this Court says: "The act in question, although it deprived of the right of review by writ of error which had hitherto obtained, in certain cases, and substituted as to such cases, the right of petitioning

for review by certiorari, subjected this last right to the same limitations as to the finality of the judgment of the State Court sought to be reviewed, which had prevailed from the beginning under section 709, R. S. Finality, therefore continues to be an essential for the purpose of the remedy by certiorari conferred by the act of 1916."

Answering the contention that the judgment ought to be treated as final, because it in effect determined the law of the case and the general principles by which the rights of the parties were to be measured, this Court said further: "But that contention is not open, as it was settled under section 709, R. S. (sec. 237, Judicial Code), that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered—a principle which excluded all conception of finality for the purpose of review, in a judgment like that below rendered. The reënactment of the requirement of finality in the act of 1916 was, in the nature of things, an adoption of the construction on the subject which had prevailed for so long a time."

Respectfully submitted,

W. P. Bynum,
R. C. Strudwick,
Counsel for Respondents.

Mitchell Printing Company, Briefs and Records, Raleigh

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 322.

NORTH CAROLINA RAILROAD COMPANY, PETITIONER,

vs.

C. D. STORY, SHERIFF OF ALAMANCE COUNTY, NORTH CAROLINA, AND P. M. KING, ADMINISTRATOR, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Additional Brief on Behalf of the Respondents, P. M. King, Administrator, Etc., and Others, in Support of the Motion to Dismiss the Writ of Certiorari Granted, by the Supreme Court of the United States, April 7, 1924.

The motion of the respondents to dismiss the Writ of Certiorari should be granted for the *following reasons*, in addition to those heretofore stated in (respondents') printed brief in support of the motion to dismiss.

The printed motion to dismiss, heretofore filed (September, 1924) is as follows:

> "Now come the respondents and move the court for an order dismissing the writ of certiorari herein:
>
> "First. Because the judgment of the Supreme Court of North Carolina thereby sought to be reviewed is not a *final* judgment."

the lower (Superior) court—to the Supreme Court of the State of North Carolina, under a recent and special statute of the State of North Carolina (Chapter 58, Laws of 1921), in language as follows:

> "From so much of the judgment as refuses to continue the *restraining* order to the *hearing*, and also make the same permanent, plaintiff excepts and *appeals*, etc." (Rec., p. 13.)

The foregoing language, "From so much of the judgment as refuses to continue the *restraining* order to the *hearing*," is the language of the appellant (the N. C. Railroad Co., appellant below, and the petitioner for writ of certiorari in this U. S. Supreme Court), and it would seem is an absolute estoppel upon it to now claim that the order of the lower (Superior) court was a final order or final decree. The Supreme Court of North Carolina, upon hearing the case on appeal, simply affirmed the order of the lower (Superior) court, and did not enlarge on it in any way. Hence, neither the order of the lower court (Superior), nor the order of the other lower court (Supreme Court of North Carolina) was a final order or *decree*, and was not meant to be so held or construed by either of the two lower courts. There were issues of fact raised by the pleadings which would require a final hearing of the case before a final decree, final judgment or final order could be passed by the court.

Issues of Facts Involved Not Proven.

(*b*) This contention—that the order is not a *final* order or final *decree*—is further borne out by the fact that the answer of the respondents to the railroad's plaintiff's) bill in equity for an injunction, which answer denies the truth of very material allegations of the

said bill in equity, raises an issue or issues of fact, in the following language (Rec., p. 9):

> "3. Answering paragraph four, the allegations contained therein are *denied* except that the plaintiff, P. M. King, Administrator, the plaintiff in action No. 8101, has caused an execution to be issued on the judgment in the said action pursuant to an order of Judge A. M. Stack, made in the said cause at the March Term, 1923, of Guilford Superior Court, a copy of which said order is hereto attached (fol. 13) as Exhibit B, and asked to be taken as part of this answer and delivered to C. D. Story, Sheriff of Alamance County, North Carolina, an execution pursuant to the said order; that the said Sheriff has levied said execution on certain real property of the plaintiff, the title and possession whereof are in the plaintiff; that the said property so levied upon is not used by the plaintiff or its lessees for transportation purposes; that the plaintiff is not now and has not for many years been engaged in the transportation business or been a carrier of freight and passengers for hire, having leased all its property, not including the property levied upon, to the Southern Railway Company, a foreign corporation."
>
> "4. The allegations of paragraphs five and six of the complaint are denied."

It is apparent from the foregoing, that the case at bar is in no position, upon its record, to have the Supreme Court of the United States finally adjudicate the right between the parties. As was said in the case of the Southern Railway *vs.* Watts, 260 U. S., 319; at the end of the opinion of the court in that case:

> "The state of the record is not such as to justify us in reversing on this ground the decree denying an interlocutory injunction, as to the Atlantic and Yadkin."

Case not Set Down for Hearing on Bill and Answer.

(*c*) There has been no agreement between the parties to hear this case on bill and answer, and it was not so set down for hearing and was not so heard by the court, as is apparent from the record.

No Power or Jurisdiction in the Particular Judge in the Equity Suit to Pass a Final Order at That Time.

(*d*) It appears from the record that this (equity) case was commenced in the Superior Court of Guilford County, North Carolina, on May 5, 1923, *and is still pending there.* Judge Harding, presiding in that court, upon the ex parte motion of the petitioner on May 5, 1923 (under authority of consolidated statutes of North Carolina, Sections 843-847, 848, 849), issued a *temporary* restraining order against the sale of certain of petitioner's property which had been levied upon under the execution in the case of King, Admr., *vs.* North Carolina Railroad, 184 N. C., 442. Judgment in this case was rendered the 29th of November, 1922. Judge Harding, in the present Equity suit of the railroad, made his order returnable on May 22, 1923, before Shaw, Judge of the Superior Court, at the Winston-Salem, which is in *another* country, to wit, Forsyth County. Any geography will show this. And it would seem, therefore, to be a fact of which the court would take judicial notice. The law of North Carolina as declared by the Supreme Court of that state is as follows: "It is well settled by our decisions that no order affecting the substantial rights of the parties can be rendered *outside* of the county wherein such action is pending, except in those cases especially provided by statute or by consent of the parties." (Cahoon *vs.* Brinkley, 176 N. C., 7; Bynum *vs.* Powe, 97 N. C., 378; McNeill *vs.* Hodges, 99 N. C., 248;

Bank *vs.* Pomeroy, 147 N. C., 293; Cox *vs.* Barden, 176 N. C., 376).

The provisions of the consolidated statutes herein referred to do authorize *interlocutory* orders in injunction cases to be made by a judge of the Superior Court in a county other than that in which the action was brought, and in which it is pending, but no authority is anywhere allowed to render a *final* judgment outside of such county. Judge Shaw, therefore, in Forsyth County had no power to render a *final* judgment in this case, and it appears from the record that he did not do so, nor attempt to do so, but he did have power, under the statutes, to pass upon an application for *an injunction pendente lite*, which he did, refusing the application.

Case on the Record so far Made.

While it is impossible, under the law, it is respectfully submitted, for this court (Supreme Court of the United States) to consider this case, at its present stage, strictly upon the merits; yet if the motion of respondents, to dismiss the writ of certiorari, be overruled, and this court decides to consider the case on its merits, based upon the record so far made, these respondents (King, admr., et al.) rely upon the two very learned opinions of Hoke, Judge, speaking for all of the judges of the Supreme Court of the State of North Carolina—first at pages 14, 15, 16 and 17 of the printed record (in the case of N. C. R. R. Co. *vs.* C. D. Story, Sheriff, etc., No. 385), and second, upon the opinion of the same judge, Hoke, again speaking for all of the judges of the Supreme Court of North Carolina, at pages 30, 31, 32 and 35, and 36, of the printed record (in the case of P. M. King, Administrator, etc., *vs.* N. C. R. Co., 390). Both of these opinions of the Supreme Court of North Carolina, and the decisions of that

court, based upon the record so far made, were in favor of the respondents (King, Administrator, etc.).

No brief has been filed by the petitioner, appellant, (for consideration of this court on final hearing) on the record so far completed.

This brief of the respondents, is filed in support of the motion to dismiss the writ of certiorari, and is in addition to the briefs of the respondents filed March 13, 1924, and September 25, 1924.

In conclusion, it is respectfully suggested that as set forth above, the record of this case is not complete, enough or in a state for this court to pass upon the facts and the law, and, therefore, the writ of certiorari should be dismissed upon the motion of respondents heretofore made and filed, and which motion is now before this court.

The respondents fully recognize that this court in first passing upon the question of whether or not a writ of certiorari should issue, it is impossible for this court to give the petition for the writ of certiorari such mature and detailed consideration, as to the law and facts, as is possible at the final hearing of the case. This court, therefore, postponed the respondents' motion to dismiss the Writ of Certiorari to this final hearing and the respondents now respectfully submit that the writ of certiorari should be dismissed.

Respectfully submitted,

ROBERT C. STRUDWICK,
WM. P. BYNUM,
CHAPIN BROWN,
Attorneys for Respondents.

NORTH CAROLINA RAILROAD COMPANY *v.* STORY, SHERIFF OF ALAMANCE COUNTY, NORTH CAROLINA, ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 322. Argued April 14, 1925.—Decided May 25, 1925.

1. A judgment of a state supreme court affirming the refusal of a lower court to continue a temporary restraining order and to grant a permanent injunction on the petition and answer, and leaving nothing for the lower court to do but dismiss the petition, *held* a final judgment and reviewable by certiorari under Jud. Code § 237, as amended September 6, 1916. P. 291.
2. An appellate court, upon an appeal from a temporary or interlocutory order or decree, has power, under general equity practice, to examine the merits, if sufficiently shown by the pleadings and record, and, upon deciding them for the defendant, to dismiss the bill. *Id.*
3. A judgment not appealed from, however erroneous, is *res judicata*. P. 292.
4. Section 206 (g) of the Transportation Act of 1920, providing: "No execution or process . . . shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control," does not prevent judgments in the cases specified but protects the carrier's property from execution under them. *Id.*
5. A decision by a state supreme court that a judgment recovered against a carrier for personal injuries suffered while its railroad was under federal control conclusively established the right to recover a second judgment in an action on the first, is not a decision that the first judgment established plaintiff's right to levy execution on the carrier's property notwithstanding § 206 (g) of the Transportation Act. P. 293.
6. The reasoning and opinion of a court are not *res judicata* unless the subject matter be definitely disposed by the decree. P. 294.

187 N. C. 184, reversed.

CERTIORARI to a decree of the Supreme Court of North Carolina affirming a decree which refused relief by injunction against the levy upon the Railroad's property of an execution to satisfy a judgment based on another judgment, which last had been recovered in an action against the railroad for personal injuries. See also 184 N. C. 442.

Mr. S. R. Prince, with whom *Messrs. H. O'B. Cooper, W. M. Hendren* and *L. E. Jeffries* were on the briefs, for petitioner.

Mr. Chapin Brown, with whom *Messrs. Robert C. Strudwick* and *William P. Bynum* were on the briefs, for respondents.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The questions in this case are two. One is of our jurisdiction to issue the writ of certiorari to review a judgment of the Supreme Court of North Carolina, and turns on its finality. The second is whether a judgment of that court against the North Carolina Railroad Company for injuries caused by the operation of the road by the United States will bar a suit by the Company to enjoin the execution of such judgment against its property under § 206 (g) of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 462). The relevant part of the section reads as follows:

"No execution or process . . . shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

Maggie Barber was killed in North Carolina by a collision between a locomotive of the Southern Railway

Company and an automobile in which she was riding. It was on the line of the North Carolina Railroad Company, then under a long lease to the Southern Railway Company. King, the administrator of the deceased, sued the North Carolina Company, in the Superior Court of Guilford County, charging negligence by defendant's lessee. The defendant by answer denied that the death was caused by the negligence of its lessee or its employees, because the railroad was then being operated by the Director General of Railroads. The jury returned a verdict for $2,500 and judgment was entered. An appeal was attempted but was not perfected, due, it is said, to the illness of counsel. Without seeking execution, the administrator instituted a second suit, based on the first judgment, averring that it was unpaid. The Company by answer set up § 206 (g), above quoted, as a defense, and averred that the second suit was brought to evade the section. The plaintiff demurred, on the ground that the first judgment had become *res judicata*. The court rendered judgment with interest and further costs. The Company appealed, and the judgment was affirmed. 184 N. C. 442. The Company opposed execution in the lower court, and excepted to the order directing it to Story, the Sheriff of Alamance County, to be levied upon certain real estate of the Company in that county.

The Company then brought the present action based on § 206 (g) in the Superior Court of Guilford County against Story and the administrator, seeking to enjoin permanently the execution. The defendants answering admitted the execution but pleaded the second judgment as *res judicata*. The Company secured a temporary restraining order and a rule on the defendants to show cause why the temporary order should not be continued and made permanent. On hearing, the motion to continue the order and make it permanent was denied. The court, pending plaintiff's appeal, stayed the execution

upon the giving of bond, while the plaintiff was taxed with the costs of the case. On appeal, the action of the lower court was affirmed by the Supreme Court. 187 N. C. 184. This Court then granted a certiorari and brought the case here. 264 U. S. 579.

Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, provides that final judgments of the highest court of a State are subject to review by certiorari. Is this judgment a final judgment? We think it is. In its terms it affirms the refusal of the lower court to continue the temporary order and to grant a permanent injunction. The Supreme Court based its decision on the facts admitted in the petition and answer. Its judgment was that the previous judgment as between the parties was *res judicata*, estopped the Company from resisting execution and thereby deprived it of any right to either a temporary or permanent injunction. Injunction was the only relief which the Company sought or could seek under its petition and prayer. The affirmance of the judgment of the lower court upon the certified opinion of the Supreme Court, left nothing for the Guilford County Court to do but to dismiss the petition. Something is said about other issues raised by the administrator in his answer; but the ruling of the Supreme Court ignored them and disposed of the case in his favor. Such a decree is a final decree. *Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238; *Mower* v. *Fletcher*, 114 U. S. 127; *Commissioners* v. *Lucas, Treasurer*, 93 U. S. 108; *Flemming* v. *Roberts*, 84 N. C. 532, 539. See also *Forgay* v. *Conrad*, 6 How. 201; *Bronson* v. *Railroad Company*, 2 Black, 524; *Beebe* v. *Russell*, 19 How. 283; *Crosby* v. *Buchanan*, 23 Wall. 420; *Thomson* v. *Dean*, 7 Wall. 342. Compare *Headman* v. *Commissioners*, 177 N. C. 261.

It is said that the judge of the lower court to whom the application for the continuance of the temporary injunc-

tion and the granting of a permanent injunction in this case had been referred by the regular judge of Guilford County, was a judge of a court of another county, and had by the practice of the State no power to grant a permanent injunction, and so that the appeal from his order denying the application to continue the temporary injunction did not bring to the Supreme Court for its decision the question of the issue of a permanent injunction. The report of the case in the Supreme Court shows it as one presenting the question of an application to continue the temporary injunction and to make it permanent, and, whatever the power of a judge of a court in another county in North Carolina to allow a permanent injunction in his court, we must assume from the action of the Supreme Court, and the recital of what was before it, that it intended the Guilford County Court on the coming down of its mandate to terminate the case by following its opinion. By the ordinary practice in equity as administered in England and this country an appellate court has the power on appeal from a temporary or interlocutory order or decree, to examine the merits of the case if sufficiently shown by the pleadings and the record and upon deciding them in favor of the defendant to dismiss the bill and save both parties the needless expense of further prosecution of the suit. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 523, 524, and cases cited; *Denver* v. *New York Trust Co.*, 229 U. S. 123; *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141. We think we have jurisdiction.

Coming now to the merits, it may be conceded that the first judgment against the Company in favor of the administrator, however erroneous it was in view of the cases of *Missouri Pacific Railroad* v. *Ault*, 256 U. S. 554, and *North Carolina Railroad Company* v. *Lee, Administrator*, 260 U. S. 16, not having been appealed from was *res judicata*. Nor could § 206 (g) prevent the second judgment. It was not directed against judgments. It was intended to pro-

tect the property of the Company not by preventing a judgment but by preventing an execution to satisfy a judgment for injury by Government operation of its road, whether that judgment was rendered against the carrier which leased the road, against the carrier which owned the road, or against the Government itself. The language of the statute assumes the existence of judgments against carriers for fault of the Government management before the section comes into play. There had been so much diversity of practice as to the person against whom the judgment should be rendered in seeking to establish and collect claims for injuries caused in government operation that Congress adopted this unusually broad method of rendering the property of the carriers immune. By virtue of a law of Congress plainly within its power, a distinction was thus made between the judgment and the execution. The state Supreme Court decided that the right to a judgment as between the plaintiff and the Railroad Company in the second case was established by the first judgment, not that a right to execution thereon was established. 184 N. C. 442.

After considering the contention made by the Company against the right to a judgment because of § 206 (g), the court said (page 448):

"It might suffice to say in answer to this position that plaintiff thus far has not undertaken to levy any process or execution against the property of the defendant road, and his proceeding, therefore, does not come within the literal terms of the provision on which he here relies, but inasmuch as the answer contains averment that plaintiff is wrongfully seeking in this present suit to avoid the force and effect of the statutory provision just quoted, we consider it pertinent to say that in our opinion the judgment sued on does not come within the inhibition as stated."

The Court then proceeded to consider § 10 of the Federal Control Act, 40 Stat. 456, and paragraphs A, B, C,

D, E, and G of § 206 of the Transportation Act of 1920, and to hold that the former was a prohibition against physical interference by third persons, creditors or others, while the road was in the possession of the Government, and that the latter was a protection of the carriers in possession from physical interference by actions or judgments provided and allowed for by the Government. "But," said the Court, "this legislation in our view was never intended to protect the carriers from judgments in independent suits by claimants when they have failed to plead or properly insist on the immunity from liability which had been provided for their protection." In effect, the Court gave two reasons for its conclusion, the first of which was that it was not dealing with an execution and the second that § 206 (g) did not apply to either a judgment or an execution in a case like the one before it. But the point adjudged was not the effect of § 206 (g) on an execution, whatever the inference from the Court's reasoning. The estoppel of the Court's conclusion reached only the judgment

It is well settled that the principle of *res judicata* is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance or only to be inferred by arguing from the decree. *Hopkins* v. *Lee,* 6 Wheat. 109, 114; *Norton* v. *Larney,* 266 U. S. 511, 517. The reasoning and opinion of the court are not *res judicata* unless the subject matter in issue be definitely disposed of by the decree. *Keane* v. *Fisher,* 10 La. Ann. 261; *Bridges* v. *McAlister,* 106 Ky. 791; *Probate Court* v. *Williams,* 30 R. I. 144; *Scottish-American Mortgage Company* v. *Bunckley,* 88 Miss. 641; *Braun* v. *Wisconsin Rendering Company,* 92 Wis. 245; *Citizens Bank of Emporia* v. *Brigham,* 61 Kan. 727.

The judgment of the Supreme Court of North Carolina is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.